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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 58

IN RE GEORGE ANASTAPLO,
Petitioner.

Brief on the Merits

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July 4, 1960

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TABLE OF AUTHORITIES CITED.*

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Petitioner, George Anastaplo, who seeks correction of the denial of his application for admission to the practice of law in the State of Illinois, respectfully submits this Brief on the Merits.

Opinions Below.

On June 12, 1957, the Committee on Character and Fitness of the First Appellate Court District of Illinois (sitting in Chicago) denied petitioner's request for rehearing of his application for admission to the Illinois bar, but not without granting him leave to file a supplementary petition for rehearing with answers to two interrogatories posed by the committee. Upon receipt of petitioner's responses (of June 25, 1957) to these interrogatories, the committee promptly declined (July 2, 1957) to grant petitioner a rehearing, Commissioners Rothschild and Sawyier dissenting.

Upon appeal, the Supreme Court of Illinois on September 17, 1957 ordered the character committee to conduct the requested rehearing. The committee, almost a year after completing the rehearing ordered by its court, refused on April 9, 1959 to recommend petitioner for admission to the bar. The committee divided 11-6 and majority and minority reports were filed in the Supreme Court of Illinois.

Upon appeal again, the Supreme Court of Illinois affirmed on November 19, 1959 the decision of the committee majority, with Mr. Justice Bristow filing a dissenting opinion. On January 21, 1960, the court below denied a petition for rehearing, with two additional members (Mr. Justice Schaefer and Mr. Justice Davis) filing a dissenting opinion. (18 Ill. 2d 182, 163 N.E. 2d 429) An attempt on the part of petitioner to "settle out of court" without sacrifice of principle resulted in a fruitless exchange of letters with the committee in February, 1960.

The various opinions, orders, reports and letters that have been referred to here are set forth in the Appendix to the Petition for a Writ of Certiorari filed by petitioner in this Court March 18, 1960 (hereafter cited as "Appendix,

Pet. Writ. Cert."). Petitioner's Supplementary Petition for Rehearing (of June 25, 1957), which advised the committee what petitioner's position would be in the event of a rehearing, is set forth in the printed record at R. 484. Petitioner's examination before the committee is reproduced in its entirety in the printed record at R. 2-366.

Jurisdiction.

The judgment of the Supreme Court of Illinois was entered November 19, 1959. Timely petition for rehearing was filed December 3, 1959 and denied January 21, 1960.

A writ of certiorari was petitioned for under 28 U.S.C. §1257, a title, right, privilege or immunity having been specially set up or claimed under the Constitution. On May 2, 1960, this Court entered the following order, "The petition for writ of certiorari is granted and the case is set for argument immediately preceding No. 661 [*Konigsberg* v. *State Bar of California*]."

Questions Presented for Review.[1]

1. Has petitioner been deprived of liberty and property, in violation of the due process and equal protection clauses of the Fourteenth Amendment, by being excluded from the bar

(a) because of the refusal of the court below and its character committee to give proper recognition to the record as a whole, a record which is overwhelmingly favorable to petitioner, in passing upon his character and fitness for admission to the bar?

[1] The questions have been arranged to conform as much as possible to the order of discussion in the Argument.

(b) because of his refusal on principle to answer political affiliations inquiries, the foundation of which inquiries in and the relevance of which to this proceeding have not only never been established but have even been denied by the explicit admission on the part of the Illinois bar authorities that they have absolutely no evidence linking petitioner with any so-called "subversive" organizations?

2. Do the decisions in this case by the court below and its character committee, which deny petitioner admission to the bar despite his evident qualifications to practice law, conform to the standards with respect to due process of law and to equal protection of the laws under the Fourteenth Amendment laid down for bar admission matters by this Court in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, and *Konigsberg* v. *State Bar*, 353 U.S. 252?

3. May a conscientious refusal, on plausible constitutional grounds, to answer questions about political affiliations be treated as evidence adverse to an applicant for admission to the bar without infringing upon the due process guarantee of the Fourteenth Amendment?

4. Has petitioner been deprived of liberty and property, in violation of the due process and equal protection clauses of the Fourteenth Amendment and of the *ex post facto* clause of the Constitution, by the attempt of the Illinois authorities to devise a "brand new exclusionary rule" whereby his refusal to answer any question put by a member of the character committee constitutes grounds for exclusion from the bar, especially when the refusal to answer these questions came early in the proceedings and did not put an end to a lengthy examination of petitioner and when only a few of the many unanswered questions are now referred to by the committee as justifying exclusion?

5. Has petitioner been deprived of liberty and property, in violation of the freedom of speech guarantees of the First and Fourteenth Amendments, by being excluded from the bar

(a) because of the expression of legitimate opinions about the right of revolution and the Declaration of Independence?

(b) because of his long-standing refusal on principle to answer questions about his political affiliations and religious beliefs?

6. Petitioner's views as to what are relevant, necessary or permissible inquiries of applicants for admission to the bar are shared neither by the court below nor by its character committee. Nevertheless, petitioner cannot, in good conscience and with due regard for the common good, submit to such inquiries even should the making of these inquiries into his political affiliations or associations be deemed permissible for bar admission proceedings under the Constitution. He has referred to eminent Americans of unquestioned character and good citizenship who have supported positions similar to his. His refusal is presented as a form of protest against such inquiries and proceedings and against the test-oath-like nature of the situation with which he has been confronted.

Is such a protest or refusal, especially when petitioner has otherwise sustained the burden of proof as to his character, fitness and good citizenship and when the sincerity of his position is not challenged, protected by the First and Fourteenth Amendments as an exercise of the right to freedom of speech for which no penalty, such as exclusion from the bar, may be exacted by a State?

7. Would not petitioner's exclusion from the bar, even if he were now shown to be a member of the Communist Party or of the Ku Klux Klan, be unjustified on the record in the face of the guarantees of freedom of speech in the First Amendment and of due process of law and equal protection of the laws in the Fourteenth Amendment? If so, can he be properly denied admission to the bar when all he has done is to refuse on principle to answer questions about such memberships, especially after the admission by the Illinois authorities that there is absolutely no evidence linking him with any "subversive" organization?

8. Aside from the effect of other constitutional limitations upon state action, does this Court have the power to examine, for their wisdom as well as their reasonableness, the methods and standards employed in the state courts which supply the bar of this Court and to correct state action which excludes an applicant qualified to practice both in his State and before this Court? If such power exists, should this Court exercise it in this instance to provide for the admission of petitioner to the Illinois bar or, at least, to the federal bar and the bar of this Court?

Constitutional Provisions and Statutes Involved.

The provisions of the Constitution of the United States involved are as follows:

> No State shall . . . pass any Bill of Attainder [or] *ex post facto* Law . . .
>
> Article I, Section 10

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> Amendment I

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Amendment XIV

The appropriate parts of the statutes involved are as follows: Rule 58, Section IX, Rules of Practice and Procedure of the Supreme Court of Illinois; Ill. Rev. Stat. 1951, chap. 110, par. 259.58, IX:

> 1. At the November term in each year, the Supreme Court shall appoint a Committee on Character and Fitness in each of the Appellate Court Districts of this State, consisting of not less than three members of the bar. . . .
>
> 2. Before admission to the bar, each applicant shall be passed upon by the Committee in his district as to his character and moral fitness. He shall furnish the Committee with an affidavit in such form as the Board of Law Examiners shall prescribe concerning his history and environments, together with the affidavits of at least three reputable persons personally acquainted with him residing in the county in which the applicant resides, each testifying that the applicant is known to the affiant to be of good moral character and general fitness to practice law, setting forth in detail the facts upon which such knowledge is based. Each applicant shall appear before the Committee of his district or some member thereof and shall furnish the Committee such evidence of his moral character and good citizenship as in the opinion of the Committee would justify his admission to the bar.
>
> 3. If the Committee is of the opinion that the applicant is of approved character and moral fitness,

it shall so certify to the Board of Law Examiners and the applicant shall thereafter be entitled to admission to the bar.

Ill. Rev. Stat. 1951, chap. 13, par. 4:

> Every person admitted to practice as an attorney and counsellor at law shall, before his name is entered upon the roll to be kept as hereinafter provided, take and subscribe to an oath, substantially in the following form:
>
> I do solemnly swear (or affirm, as the case may be), that I will support the constitution of the United States and the constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of attorney and counsellor at law to the best of my ability.

The Rules of the Committee on Character and Fitness for the First Appellate Court District of Illinois (adopted September 1, 1939) are set forth in their entirety at R. 366-370.

STATEMENT OF THE CASE.

1. 1950-1955.

Petitioner began the study of law in 1948 at the University of Chicago Law School, eighteen months after completion of his wartime service as an Air Force navigator officer.[2] His 1950 application for admission to the Illinois bar was denied by the Chicago Committee on Character and Fitness in 1951, a denial affirmed by the Illinois Supreme Court in 1954 (3 Ill. 2d 471, 121 N.E. 2d 826).

Both the court and the committee stressed as justification for their action petitioner's views on the right of revolution as well as his refusal on principle to answer questions about possible membership in any political organization. This Court, with two members dissenting, refused in 1955 to review the Illinois action (384 U.S. 946, 349 U.S. 903, 908.)[3]

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[2] Petitioner was born in St. Louis, Missouri, November 7, 1925, grew up at Carterville, Illinois, and received most of his higher education at the University of Chicago after his United States Air Force Service in the Pacific, Europe, North Africa and the Middle East. (He retained his Air Force commission until a reorganization of the Reserve after the Korean War.) He is married and the father of three children. Petitioner is presently serving as Lecturer in the Liberal Arts and Research Associate in University College, The University of Chicago. (This, and similar, information is recorded in the standard questionnaire and in petitioner's letter of March 27, 1958. (R. 371-385, 108-120)

[3] Petitioner's 1955 Jurisdictional Statement in the Supreme Court of the United States (January 11, 1955), pp. 9-17, presents a careful summary of the initial examinations of petitioner by the Committee on Character and Fitness in 1950-1951. A substantial part of the record made at that time on which the 1954-1955 appeal was based is reproduced in London, "Heresy and the Illinois Bar: The

2. 1957-1960.

A renewed application for admission to the bar was filed by petitioner with the character committee in 1957, after this Court's decisions in the *Schware* and *Konigsberg* cases, 353 U.S. 232, 252. The committee refused to consider this application after inquiring of and learning from petitioner that he still held his former views with respect to the right of revolution and that he must continue to refuse to answer any questions about his political affiliations and associations.[4]

Petitioner appealed this 1957 decision of the committee to the Supreme Court of Illinois. That court ordered the character committee to conduct a rehearing, specifying the questions on which evidence should be taken:[5]

> The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg* v. *State Bar of*

Application of George Anastaplo for Admission," 12 Lawyers Guild Rev. 163 (1952). Citations to law review and other comments on the 1950-1955 phase in the case are collected in Note 1, Petition for a Writ of Certiorari (March 18, 1960). Professor Malcolm Sharp's extended comment on the early phase in the case is set forth in the printed record. (R. 475-484) Petitioner's 1954 Brief in the Supreme Court of Illinois provides a comprehensive analysis of loyalty-oath proceedings in bar admission matters. This 115-page brief was filed in this Court as an exhibit with the 1955 Jurisdictional Statement.

[4] Appendix, Pet. Writ. Cert., 1; Petitioner's Supplementary Petition for Rehearing, June 25, 1957. (R. 484-490)

[5] Appendix, Pet. Writ. Cert., 7. This language seems to have been adapted from Commissioner Rothschild's 1957 dissenting opinion (Appendix, Pet. Writ. Cert., 2, 6) and seemed also, in this context, implicitly to rule out any further questions about petitioner's possible affiliations. See Section 2, petitioner's 1959 Brief in the court below (filed as part of the record with the Petition for a Writ of Certiorari). See, also, R. 61-62, 70.

California, 353 U.S. 252, and *Yates* v. *United States*, 1 L. ed. 2d 1356, 77 S. Ct. 1064. Additional questions presented concern the applicant's activities since his original application was denied, and his present reputation.

We are of the opinion that the Committee should have allowed the petition for rehearing and heard evidence *on these matters*, and the Committee is requested to do so, and to report the evidence and its conclusions. [Italics added.]

In obedience to this directive, more than twenty hours of testimony were taken from petitioner by the full committee between February and May 1958 (R. 2-366) and a dozen character affidavits and references were put in the record (R. 386-414). Another year passed, however, before the committee was ready to announce its decision, once again refusing to certify petitioner for admission to the bar. The committee filed with the court below at that time a report explaining its decision. Of the seventeen members of the committee, eleven signed this adverse report; six commissioners signed a minority report recommending admission. (Appendix, Pet. Writ. Cert., 8, 28)

The court below affirmed its committee's decision on November 19, 1959 and, after a petition for rehearing, on January 21, 1960. Of the seven members of that court, four joined in the *per curiam* opinion upholding the committee majority; three justices filed two dissenting opinions recommending admission. (18 Ill. 2d 182, 163 N.E. 2d 429; Appendix, Pet. Writ. Cert., 34, 53, 78) It is of this decision and decree by the court below that review by this Court has been secured.

The facts in this case consist, to a large extent, of a debate between members of the committee and petitioner that runs through the six sessions that are recorded in

four hundred pages of transcript.[6] Perhaps the fairest and most effective way of presenting the facts is to set forth in a connected narrative some of the highlights of this debate in petitioner's six appearances before the character committee during the current rehearing. It is for that reason that this Statement of the Case takes the form it does.[7]

3. First Session, February 28, 1958.

The examination of petitioner before the full committee (during the current 1957-1960 phase) began with a review and elaboration of various items on the standard applicant's questionnaire which petitioner had been required to fill out, items relating to his education, military service, travels abroad, employment, legal studies, publications and civic activities. This part of his examination lasted about forty-five minutes (R. 22).

The next stage featured inquiries about organizations to which petitioner might belong.[8] Petitioner was asked about and denied membership in various veterans' or-

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[6] The entire transcript is reproduced in the printed record. (R. 2-366.)

[7] The reader of the excerpts that follow might find it convenient to be able to check immediately the final vote of various of the participants. The commissioners who voted against petitioner were Mr. D. Robert Thomas (Chairman), Mr. Charles A. Bane, Mr. Richmond M. Corbett, Mr. Walter H. Moses, Mr. John M. O'Connor, Jr., Mr. Francis J. Seiter, Mr. Len Young Smith, Mr. Robert A. Sprecher, Mr. Edmund A. Stephan (Chairman of the Sub-committee), Mr. Jerome S. Weiss, Mr. Horace A. Young. The commissioners who voted for petitioner were Mr. James P. Carey, Jr., Mr. J. R. Christianson, Mr. James E. Hastings, Mr. George N. Leighton, Mr. Edward I. Rothschild (Vice-Chairman), Mr. Calvin P. Sawyier. (Appendix, Pet. Writ. Cert., 28, 33)

[8] Commissioner Bane had been assigned by the committee to conduct this part of the examination (R. 3, 22). Commissioner Carey had been assigned to conduct the examination relating to character and fitness in the usual sense (concluding at R. 22).

ganizations, alumni organizations and civic organizations (R. 27). There then followed the first question relating to possible membership in a political organization that petitioner was obliged to refuse to answer,[9] the "foundation" for which question having been laid in this manner (R. 27-28):

> Commissioner Bane: Have you, since 1951, become a member—let me ask you first of all, you are of Greek descent, Mr. Anastaplo?
>
> Mr. Anastaplo: That is true.
>
> Q. Your father and mother were both Greek?
>
> A. Greek descent, yes.
>
> Q. Since 1951, have you become a member of any nationality organization related to Greek Americans or the Greeks who were in this country?
>
> A. No, I have not.
>
> Q. Are you a member, for example, of Ahepa?
>
> A. No, sir.
>
> Q. Are you familiar with the list of organizations which have been designated by the Attorney General as subversive?
>
> A. I am familiar with the fact that some have been designated by the Attorney General, and I know of some that are on the list, but I am not familiar with the list itself.
>
> Q. Let me ask you, bearing in mind your Greek descent, whether you are a member of an organization which has been designated by the Attorney General as subversive, known as the American Council for a Democratic Greece?
>
> A. I have already answered a question about nationality groups. And I have answered other ques-

[9] Petitioner had indicated earlier that he would, in the event of a rehearing, maintain the position he had held since November 10, 1950: that is, he would continue to defend the Declaration of Independence and the right of revolution and he would continue to refuse to answer questions about political affiliations (including inquiries about the Communist Party and the Ku Klux Klan). Petitioner's Supplementary Petition for Rehearing, June 25, 1957. (R. 484-490)

tions about groups—so long as they were—so long as I could in any way tell myself this was not a question involving political activity. Now, since you seem to want to put it in those terms, I simply have to call a halt to my answering that kind of question.

Petitioner was asked his grounds for refusing to answer "that kind of question." He recited objections based on the First and Fourteenth Amendments and on the *ex post facto* and bill of attainder clauses of the Federal Constitution. He also noted that he did not believe the term "activities", in the Supreme Court of Illinois order which had decreed the rehearing, was intended to include political affiliations.[10] He then stated, in response to further questions, that he was under no coercion to take the position he did, that his position was not taken because of any fear of perjury indictments if he answered one way or another, and that it was a position that did not rely upon the Fifth Amendment to the Federal Constitution (R. 30-32). The examination continued (R. 32-34):

Commissioner Bane: Let us proceed now, and let me ask you whether, if I had not indicated to you that the American Council for a Democratic Greece is on the Attorney General's list, and if you had not known whether it was or not, would you have been willing to answer the question as to whether you were a member of that council?

Mr. Anastaplo: Probably, in the sense that I—

Q. Probably yes, you would have been willing to answer?

A. In the sense that I do not want to make it appear, and I would bend over backwards not to make it appear, that I am in any way obstructing the action of the committee, the function of the committee, or simply raising objections on technical points, or even not technical ones, when they might not be altogether

[10] See Note 5 (this Brief).

appropriate. Let me say this. One can argue that some of the other questions I answered were perhaps inappropriate. One can argue that. And if one wanted to be technical, perhaps one would have to argue it. But I simply want to lean over backwards to indicate that I would like to be as cooperative with this committee as possible. And since I am really ignorant—I have already told you—I am really ignorant of most of the names on that list, you could probably name a dozen of them right now, and I could not begin to tell whether they are on the list or not—I would probably cooperate to some extent in answering some of them, if I could in good conscience say to myself that I didn't know whether it was on the list. But if I know it's on the list, and I know that you are asking it off the list—I mean, this is all very vague perhaps to you—but if I know that somehow it had something to do with this kind of inquiry, the kind that I have been opposed to for seven years, then in good conscience I would have to refuse. You can take advantage of my ignorance if you like, but certainly it is ignorance, of what is on the list.

Q. Well, now, I am not taking advantage of your ignorance, as we have not done, because we have been frank with you—

A. That is true.

Q. —in indicating the organizations which are on the list. I now want to read the names or titles of certain other organizations which are on the list, according to the information that we have, and I want to ask you whether you have become a member of that organization since 1951, and in each case whether you are a member of it now.

A. May I ask first, why—does this committee care to say why they want to know?

Q. No, I want to ask the question, and then I want to get your answer.

A. May I ask another question if you don't want to answer that one?

Q. Mr. Anastaplo, you are being questioned, you are the applicant; you understand that?

A. But cannot—could not counsel ask the relevance of the inquiry that is being made?

Q. I don't believe that the committee is going to permit you to put on two hats, and be a witness one minute and—

A. Cannot I ask, then, the relevance of the inquiry?

Q. I will refer the matter to the chairman of our subcommittee, but it is my view that you are the witness and that your function today is to answer questions, and not to ask them.

As Commissioner Bane prepared to ask about petitioner's possible membership in various organizations designated by him as on "the Attorney General's list", petitioner was permitted to object "that there has been no showing or indication to me here, or by any other means, either of the developments [11] of the question, or the validity of the list, or any showing that the list was devised for any purpose that relates to the purpose of this inquiry." (R. 34-35) Nevertheless, petitioner was thereupon asked questions which he refused to answer about possible membership in The Abraham Lincoln School of Chicago, the Civil Rights Congress for Texas, the Council for Greek Americans, the Ku Klux Klan, the Silver Shirts of America, and the American Youth for Democracy, all of which were said to be organizations on "the Attorney General's list." (R. 42-43)

To all these questions, as well as the subsequent one about whether he was then or had ever been a member of the Communist Party (R. 37-38), petitioner raised his constitutional objections under the First and Fourteenth Amendments. In addition, he offered the committee evidence with respect to the Communist Party question that it had

[11] *I.e.*, foundation for or relevance of. (R. 35)

never been thought either by the committee or by the Supreme Court of Illinois that petitioner was a Communist (R. 38-39). Petitioner pointed out that this evidence was not to be taken for his answer to this question but rather as casting light on the good faith and purpose of the present inquiry about Communist Party membership.[12] The committee, after a recess for deliberation in executive session, refused to ask for this evidence (R. 43-44). The substance of this evidence was acknowledged in the fifth session by the committee when it was induced to concede (R. 234),

> . . . no one has stated [orally or in writing] to this Committee that you are or have ever been a Communist or a member of the Communist Party, or a member of the Ku Klux Klan, or a member of the organizations or any of the organizations listed as subversive by the Attorney General's list . . .

4. Second Session, March 21, 1958.

Petitioner's second appearance before the committee was devoted for the most part to an examination of the extent of his commitment to constitutional government. The passages set forth below serve to indicate the nature of the discussion.

> Commissioner Bane: I want to call your attention to question 19(c) on the questionnaire, which asks: "State what you believe are some of the obligations of good citizenship." Your response is as follows: "In addition to the answer given in my questionnaire of October 26, 1950, I should like to emphasize the obligation of a good citizen to 'honestly strive against the many lawless and unrighteous deeds which are done in a state.'" . . . I am asking you if you will give us examples of lawless and unrighteous deeds which you would strive against.

[12] Letter to the committee, March 3, 1958 (R. 61, 64); Closing Argument. (R. 335-336.)

Mr. Anastaplo: I suppose a lawless deed would be a corruption of officials in a city, against which one might take action, by legal action or other means.

Q. How about unrighteous deeds?

A. The most striking example that comes to my mind is the action of this committee the last seven years.

Q. Taking the action of this committee as an example of an unrighteous deed, how would you conceive that you ought to strive against it?

A. First by refusing to bow before the men of the committee in the course of the examination, and thereupon to take action necessary when the decision has been rendered.

Q. Is there any other way in which you might strive against it?

A. I might tell a few people about it, and try to persuade them this sort of thing is not desirable.

Q. What would you expect them to do after you had told them about it, or what, if anything, would you urge them to do?

A. To think about it, and reflect upon what it means to a society that permits such things to happen.

Q. Would that be the end of what you would hope or expect to do?

A. That is practically what I have done.

Q. You haven't answered the question. Is that the end of what you would hope or expect to do?

A. That is about it.

Q. Would you urge them to any action of any kind?

A. Probably not; simply a matter of expressing my views on the subject and letting people know about it generally. (R. 75-77)

Neither petitioner nor Commissioner Bane could supply any examples in contemporary America of lawless deeds which a citizen would be entitled to strive against "by action which the State itself deems to be lawless" (R. 78).

In response to subsequent inquiry, petitioner affirmed that he did and would continue to support the Constitution

of the United States, that he adhered to the division of governmental powers as set forth in that constitution, and that he supported "the provisions in the Federal Constitution with respect to federalism"[13] (R. 81). But he refused to answer Commissioner Bane's question (R. 81):

> Do you have any belief that ultimately in this country there will be no need for a Federal Constitution, by reason of the class struggle which will lead to the ultimate disappearance of the state? . . . I mean "sovereign state", and the reference to the class struggle and ultimate disappearance of the state is a shorthand reference to the principles of Marx and Lenin.

Instead of answering, petitioner stated his objections to such questions, likening them to questions about political affiliations. In the course of these objections, Commissioner Bane restated his question about the "need for a Federal Constitution," insisting that petitioner should not take into account the fact that Marx and Lenin had been mentioned in the earlier formulation of the question (R. 84):

> Commissioner Bane: Do you believe that a time will ever come when there no longer will be a necessity in the United States for the Federal Constitution—pe-

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[13] Petitioner had answered, in response to the questionnaire request that he "State what you understand to be the principles underlying the Constitution of the United States",

> One principle consists of the doctrine of the separation of powers; thus, among the Executive, Legislature and Judiciary are distributed various functions and powers in a manner designed to provide for a balance of power and to prevent totally unrestrained action by any one branch of government. Another basic principle is that such government is constituted so as to secure certain inalienable rights, those rights to Life, Liberty and the Pursuit of Happiness (and elements of these rights are explicitly set forth in such parts of the Constitution as the Bill of Rights). And, of course, whenever the particular government in power becomes destructive of these principles and ends, it is the right of the people to alter or to abolish it and thereupon to establish a new government.

(Questionnaire item 19(a), R. 381-382)

riod. That is all there is to it, end of the question.

Mr. Anastaplo: And in answer to the question, I am to disregard anything else you have mentioned?

Q. You have heard the question.

A. Is that assumed? I would say no, I don't think it is very likely that the Federal Constitution—that the need for the Federal Constitution will be superseded.

Q. Does that mean, then, that you do not subscribe to the Marxist-Leninist doctrine that as a result of a class struggle there will be a disappearance of the state, and consequently a disappearance of any need for a written document concerning the government of that state?

A. And that I refuse to answer, on the grounds that I have just indicated . . .

These grounds included references to the free speech provision of the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment, which grounds petitioner proceeded to set forth in detail (R. 85-92).

Commissioner Bane concluded his principal examination of petitioner in the following exchange (R. 93):

Commissioner Bane: Bearing in mind the provisions of the Federal Constitution defining and ascribing generally the powers of the executive and legislative branches of the Federal Government, I would like to ask you whether you consider that form of government preferable to government by presidium, such as exists in the Soviet Union?

Mr. Anastaplo: I refuse to answer the question, on the same grounds that I have indicated.

Q. Are you modifying or withdrawing, in any sense, your answer to question 20 [of the applicant's questionnaire], that you do now without any mental reservation and will hereafter loyally support the Constitution of the United States?

A. I am not. I have answered that question.

Q. Are you taking the position that having answered that question, this committee has no authority to inquire into any specifics or details concerning the meaning of your answer?

A. That is not what I am talking about. The position I am—

Q. What is your position?

A. The position I am taking is that the committee has no authority to use unconstitutional means to check —that is what I mean by that answer.

As the session drew to a close, Commissioner Stephan thought it advisable to inform petitioner "as to what *we*[14] mean by a member of the Communist Party" in the hope that it might "make it easier for you to respond to future questions" (R. 101):[14]

> Commissioner Stephan: '*Now what I mean when I ask the question is this*: By a communist *I mean* a member of the Communist Party; *I mean* a person who is a disciplined, active member of that Party; *I mean* a person who believes in communist doctrine and goals. Among these are class warfare, putting an end to representative government, putting an end to civil liberties, suppressing religion, in effect destroying constitutional government as we know it in this country. These goals are accomplished by force, when necessary, by fraud and subversion, they will be accomplished by violence as soon as it is expedient to use violence. Peaceful, democratic, constitutional avenues for attaining these goals are not utilized.

Commissioner Stephan, after asserting that there was "a contradiction in . . . an applicant saying he will support the Constitution of the United States and the Constitution of the State of Illinois, and at the same time be imbued with the views, the programs, the goals that *I have attrib-*

[14] Italics added throughout.

uted[14] to a communist", gave petitioner the following notice (R. 102-103):[14]

> Commissioner Stephan: Now you have asked for a warning when we put a question to you we think is a pivotal, important question in connection with your qualification. I must tell you that we consider that question, "Are you a member of the Communist Party," such a question; and that the refusal to answer it may have serious consequences to your application. *I am not pre-judging you in this regard, and I haven't the slightest idea how any other member of the committee is going to vote on this proposition. I have not, for that matter, made my own mind up as to how I am going to vote.* But I can see that it would well be an important question in dealing with your application. I want you to understand that. That is not a frivolous position. I think it needs to be treated very seriously. Do you want to make some statement?
>
> Mr. Anastaplo: Yes, I would like to find out exactly what this entails. You are not suggesting that refusal to answer that question would *per se* block my admission to the bar?
>
> Commissioner Stephan: No, I am saying your refusal to answer that question as to whether you are a member of the Communist Party, could and might.
>
> Mr. Anastaplo: I see.

Petitioner responded to Commissioner Stephan's declaration with the following inquiry (R. 103):

> I assume that the committee does not care to state why this is a particularly serious issue with respect to me? I mean—I notice you say nothing about the Ku Klux Klan or the Silver Shirts of America, about which you have also asked with the same amount of emphasis up to this point, and which I have refused to answer [questions about] for the same reasons. Would you care to indicate why you say this about this question and not about the other ones?

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[14] Italics added throughout.

Commissioner Stephan suggested that the history of petitioner's case was important in assessing what questions should be stressed by the committee. Petitioner observed that the history of the case included his refusal in 1951 to answer questions about the Ku Klux Klan as well as about the Communist Party: if the criterion was that a question had been asked before and not answered by petitioner, he argued, the Ku Klux Klan question seemed to qualify as much as the one about the Communist Party for inclusion in Commissioner Stephan's attempted warning (R. 103-104).

The examination of petitioner during this second session before the character committee concluded with inquiries as to his opinion about the eligibility of a member of the Communist Party for admission to the bar (R. 105-107):[15]

> Commissioner Stephan: [A Communist] is a person who believes in class warfare, who believes in the destruction of constitutional government, he believes in the abolition of private property, the suppression of religion, he follows a line dictated by a foreign government, and, if necessary, he will accomplish his goals by violence. Let us assume we have credible proof of such views by an applicant from an outside source. Would you say that we should or should not admit such a person to membership in the bar?
>
> Mr. Anastaplo: I would not care to make a judgment simply on that because these things seem to me, as you relate them, largely theoretical and have no application to one's daily life.

[15] This inquiry, about the eligibility of the Communist for admission to the bar, was the one with which this case opened on November 10, 1950. Petitioner's "wrong" answer to this inquiry led to an examination of his views about the right of revolution and thereupon to inquiries into his affiliations. (Closing Argument, R. 330-331.) *Cf* Note, 50 Northwestern Univ. L. Rev. 94, which sees the starting point (for the 1950 committee's inquiries into petitioner's possible political affiliations) in the questionnaire item reproduced in Note 13 (this Brief).

Q. I said he was an active member of the Communist Party.

A. Yes, but you proceeded to indicate what that activity refers to, in terms of very long-range goals that the Communist Party is assumed to have. And that would not be sufficient. A man may believe in an organization that intends someday to punish the wicked, reward the good, destroy the earth, remove all constitutional government from this earth. That is a church organization, and that may be just as far-fetched as the communist one.

Q. Are you attempting to say that even though a man has these goals, and is actively working towards them with others, that in determining whether he should be admitted to the bar we should first decide whether those goals are likely to be accomplished immediately or whether they are long term?

A. That would certainly be a relevant consideration.

Q. Are you thinking about clear and present danger problems; is that the point you are making?

A. That, of course, may be related. I am mostly thinking about a reasonable evaluation in the matter. That is to say, a man who believes in the kingdom of the proletariat and a man who believes in the Kingdom of God upon Earth, may both be visionaries, whose actions and goals have no immediate relation to everyday political life and work as a member of the bar.

• • •

Q. I say, he wants to put an end to representative government and he believes in dictatorship of the proletariat. Wouldn't you say he plans to put an end to representative government as we know it?

A. I am saying that that may be part of a long-run theoretical goal.

Q. Let's assume it is. Can you say such a man can take the oath to support the Constitution of the United States and the Constitution of the State of Illinois?

A. Certainly, as much as to say a devout Christian can take the oath to support the Constitutions of the United States and Illinois, even though he is bent by his efforts on establishing the Kingdom of God on Earth.

Q. Don't you think when you swear to support the Constitution of the United States and the Constitution of the State of Illinois that you have a belief in a certain minimum amount of representative government, a certain minimum amount of civil liberty, a certain amount of power reserved to the people?

A. Certainly, and both Christians and communists do, perhaps; they may have that belief in representative government in the practical and immediate future. That is why I do not think that one can make a judgment beforehand, before he knows more about the situation.

Q. So you are saying you see no essential incompatibility in being an active, disciplined, militant Communist Party member, and the taking of the oath required of Illinois attorneys?

A. Not necessarily, yes, sir. . . . May I also add, sir, that I may be completely wrong [in these opinions about the eligibility of Communist Party members], but I would insist that these opinions I am now expressing would have no bearing on my character and fitness. [16]

5. Third Session, April 7, 1958.

The session opened with the committee denying two motions petitioner had presented March 27, 1958 in a letter of objections to the committee's conduct of the inquiry (R. 121-122, 118-119):

I move that the committee now rule, on the basis of the objections I have raised, that my responses or lack of responses at any time in the course of this rehearing, to the inquiries about affiliations, as well

[16] Here, as elsewhere, the bracketed words have been added to make clear the intended meaning of the passage.

as to the inquiries about Marxist or Leninist doctrines, should have no adverse bearing on my application.

I further move that the committee rule that no further inquiries into affiliations be permitted, or any other inquiry related thereto.

Petitioner subsequently filed with the Committee a document entitled, "Remarks by George Anastaplo, prepared for presentation to the Committee on Character and Fitness at the beginning of the meeting of April 7, 1958" (R. 128, 426-432). This document was an extended comment on Commissioner Stephan's remarks toward the close of the second session on the nature of the Communist Party and on the relation of those remarks to petitioner's matter. The paper, anticipating some of the discussion in this third session, explained why an applicant was not bound to accept Commissioner Stephan's characterization of the Communist Party, asked for some indication why the Communist Party inquiries should be now made so much of in petitioner's case, and included the following challenge to the committee (R. 429-430):

Thus, the bearing of this question about the Communist Party on my matter is in no way indicated. All I have instead is Mr. Stephan's personal dissertation about the doctrines and goals of the Communist Party and why he is opposed to it. For all you know, I may be opposed to it for the same reasons. But that is not the issue here. Mr. Stephan is dubious, to say the least, about the qualifications of a Communist Party member because that member's goals and doctrines probably include, among others,

1. putting an end to representative government;
2. putting an end to civil liberties;
3. destroying constitutional government.

> As between the Committee and me, who has stood firmest for constitutional government, for the rule of law, for civil liberties? Who has not only spoken for these principles but made sacrifices on their behalf. Have I not exhibited enough of a commitment to these principles to make unnecessary and presumptuous any attempt to check up on me indirectly with inquiries about affiliations? Have I not shown that my entire position before the Committee is based on these principles, principles which I have spelled out in detail for many years now? Have I not already demonstrated a strong enough attachment to constitutional law, to the rule of law, and to civil liberties? If Mr. Stephan is correct in his description of the goals of the Communist Party, I suggest that this Committee, in the way it has handled my application for admission the past eight years, has served admirably the goals of Mr. Stephan's Communist Party.

A discussion of constitutional problems followed, with the chairman of the committee advancing *Communications Workers Association* v. *Douds*, 339 U.S. 382, as bearing on petitioner's matter and with petitioner, after pointing to the *Schware* and *Konigsberg* cases as much more relevant for bar admission purposes, stating that (R. 135),

> I do not agree with the majority opinion in the *Douds* case. I would point to the dissents in the *Douds* case, and say, "That is where I stand." Am I ineligible because I take the dissents of certain members of the Supreme Court seriously? Furthermore, Mr. Stephan, and I think this is a serious problem I am about to bring up, there has been no showing at any time in the course of these seven or eight years, why these questions or inquiries as to communist affiliations have any bearing upon my application; why is it important in my case; what have I

done, what have I said, what do you know about me, that makes it important to emphasize, as you did at the end of the last session, questions about communism?

Commissioner Young, in an attempt to justify the special emphasis that had been given the Communist Party questions, opened the following exchange (R. 136):

> Commissioner Young: Mr. Anastaplo, if you are permitted to practice law, some day you may be on a case opposite me. I want to know whether or not I must, in my practice of law, deal with lawyers who are members of the Communist Party and who do not regard their oaths—
>
> Mr. Anastaplo: Let me ask you, sir—
>
> Q. No. You answer my question.
>
> A. Yes, sir, I appreciate your problem.
>
> Q. Well, why don't you answer it, then?
>
> A. But then—I will tell you why. Because I think you should also want, as your opponents and as your colleagues in the bar, men who stand on principle. And I further ask you, sir, whether you have seen anything from me, or heard anything from me, either in the present record or that of the last seven or eight years, which would indicate I would not take my oath seriously, or I would take unfair advantage of you if I were your opponent in a court of law?

At this point, Commissioner Young asked petitioner, "Do you believe in a Supreme Being?", going on to defend this question as appropriate because of the oath taken by petitioner at the beginning of the rehearing (R. 137).[17] Petitioner objected to and refused to cooperate with this line of inquiry into his religious beliefs, adding that (R. 137),

> . . . this is a settled problem you are dealing with, the problem of the relation of a [belief in] a Supreme

[17] "Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?" (R. 2)

> Being to the validity of one's oath. I submit to you that this problem has been settled in a formal sort of way by Anglo-American law, about a hundred years ago.

After further constitutional discussion, Commissioner Stephan announced that the inquiry would turn to petitioner's "belief in the right of overthrow." (R. 145) Petitioner immediately stated that he had several objections to inquiry along these lines (R. 145),

> . . . objections [that] are based on the premise that I have shown and I am willing to show my willingness and ability to take the oath of office for attorney in good faith, and that no indication has been given as to why I should be questioned further along this line.

He then stated objections based on the freedom of speech provision of the First Amendment and on the equal protection and due process provisions of the Fourteenth Amendment (R. 146).

Petitioner's motion, that the committee not pursue the line of inquiry with respect to the right of revolution, was denied and he was asked to set forth his position on the subject. This he proceeded to do by furnishing extracts from the writings of President Abraham Lincoln, Senator Daniel Webster, and St. Thomas Aquinas, as well as from the Declaration of Independence and a statement petitioner had made on another occasion (R. 147-148).[18] Petitioner stated that these documents set

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[18] Surprise has been expressed that petitioner, notwithstanding his objections to such examination, consented to answer fully questions on the subject of the right of revolution after his objections had been overruled. (See, *e.g.*, Committee Majority Report, Appendix, Pet. Writ. Cert., 18n.) In addition, there have been comments such as that of Mr. Justice Schaefer and Mr. Justice Davis in their dissenting opinion (Appendix, Pet. Writ. Cert., 80):

> . . . Petitioner's] views upon the right of revolution were fully expounded before the Committee. Those views are incompatible with membership in the Communist Party, or with any-

forth his present beliefs on the right of revolution, adding the qualification that, if anything, both Webster and Thomas are more radical than he is with respect to this issue (R. 149-150).

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thing resembling subversion. It is hard to understand the logic of a position that permits the applicant to expound at length upon his views as to the right of revolution but prevents him from answering questions as to Communist Party membership. But we cannot say that what seems to us to be a logical inconsistency is a reflection upon his character.

Petitioner has explained that not only did he want to keep the issues as precise as possible and to cooperate with the committee as fully as possible in the course of the rehearing, but he recognized that his views on the right of revolution and the Declaration of Independence were already known to the committee and had been critical in the committee's 1950-1951 decision to ask and insist upon questions about his possible political affiliations. (See, *e.g.*, R. 489)

Furthermore, he has argued, there is an important practical difference between (1) discussion of the right of revolution and (2) inquiries into one's political affiliations (which petitioner has always refused to answer). The first relates to an applicant's understanding of the Constitution, to the support of which an oath is to be taken by the attorney (see Items 19(a) and 20, Questionnaire, R. 381-382; also, Note 13, this Brief); the second relates to one's political views, to one's views on the best government or party under the Constitution. Our constitutional system *can* usually operate properly if the first is open to discussion while the second set of views is left to the individual to disclose and act upon as he wishes. The second has to be protected in this manner, if only because of party spirit and of the harm that can befall the Constitution should this area not be kept beyond the inquiry (and hence control) of a particular partisan government. (This concern is reflected, for instance, in the protection given the secret ballot.)

It would be better, petitioner advised a member of the court below in 1955 (R. 418, 421), if bar admission committees were required to steer clear altogether of discussions about the right of revolution as well: the distortion of petitioner's views on this subject, both in the committee report and in the opinion of the court below, should provide warning enough against such inquiries and discussion. But, in any event, petitioner has sought to keep the issues separate; he has spoken freely about his views on the Constitution (and, therefore, on the right of revolution); he has consistently refused to answer questions about possible membership in any number of political organizations, "subversive" or otherwise (even though he cannot be held responsible for the inferences (logical or otherwise) anyone might draw from his expression of this or that view of the Constitution or, indeed, from his entire position before the Committee).

Much of the subsequent discussion this session centered about petitioner's views on this subject, which are best summed up by him in his statement (R. 148; 341-342):

> Almost everyone would agree there are times when a government should be overthrown by force. Ultimately, a citizen has to decide for himself when such a time comes—when the principles of the Declaration of Independence apply. The conscientious citizen reserves the right and duty to judge his government even as he takes the oath to support not that government but the Constitution. In fact, our Constitution can be said to have this right implicit in it, a right that protects the Constitution itself from subversion by a government that may be constitutional only in appearance. But, as I said when I first appeared before the full Committee on January 5, 1951, I do not think anyone would be justified at a time such as this, when the normal processes of government permit reasonable and peaceful change, to participate in action leading to the overthrow of government.
>
> The right of revolution, as I understand it, is something that probably all the members of the Committee on Character and Fitness and of the Supreme Court of Illinois believe in. The Committee must realize that I would be no less reluctant than they to see this right of revolution exercised except in the most extreme circumstances. I trust that my position, and what I have contributed to its defense, indicate an abiding commitment to constitutional government.

After considerable discussion, during which he elaborated his position on the right of revolution, petitioner refused to answer whether he felt the Marxist view about revolution was compatible with the views expressed in the documents he had submitted (R. 156), explaining

> . . . I do not want to be put in the position of endorsing—explicitly endorsing or denying communist

> doctrine. I am willing to be put in a position, having set forth my objections to all this kind of inquiry, of expressing clearly what my views are.

After having been further examined with respect to his opinions about various hypothetical statutes and cases relating to the right of revolution and its advocacy, petitioner stated (R. 158),

> . . . let me stress again, I may be wrong in many of the answers I give you as to whether I think particular statutes are unconstitutional or not. But that's not the issue. The issue is not about these supposititious cases but about my character and fitness, and you know about my character and fitness the claim on my part—and I have yet to see it demonstrated differently—the claim that I believe with respect to the right of revolution what practically every one of you believe.

Nevertheless, Commissioner Stephan thought it appropriate, as relevant to the right of revolution inquiry, to ask petitioner once again whether he was then a member of the Communist Party, against which petitioner protested (R. 160),

> . . . There is an objection [to be made here] on the basis of elementary notions of fairness. . . . There is no indication at all by anything I have said so far, about revolution today, that would make it necessary to go through this procedure [of inquiring into affiliations] again.

The session drew to a close with an inquiry as to whether petitioner would ever feel justified in resisting by force the implementation of a decree of the United States Supreme Court which he thought "simply wrong, or shameful, or, in your view, unconstitutional" (R. 161) Petitioner responded, "I would not care to say that there would be no instances in which force might have to be

brought to bear" (R. 161), adding however that in the instance in which he was put to the test (that is, his bar admission matter) he had not resisted such a decree by force. He went on to say about resistance to Court decrees (R. 163),

> Obviously, under present circumstances I don't think it is likely to happen. But, for instance, in Germany where judicial decrees, in accordance with the form of the constitution, were resisted. . . .

Furthermore, he pointed out, "there may be extreme circumstances when this resistance [to judicial decrees] would be a defence of the Constitution" (R. 164).

Petitioner stressed several times that, in speaking about the right of revolution and resistance to judicial decrees, he was speaking of extreme circumstances, insisting that he could not foresee any cause for revolution on the American scene in the years ahead. His being pressed for "immediate" examples of circumstances in which the right of revolution might rightfully be exercised led to this exchange (R. 167):

> Commissioner Young: Tell us something that you think might happen tomorrow that you think might justify it.
>
> Mr. Anastaplo: Suppose for some reason or other, the legislature and government went insane tomorrow from some kind of chemical reactions—only Washington went crazy. What do you and I do until next election? Do we sit by and let them destroy us?
>
> Commissioner Young: Can we make the example a bit more realistic?
>
> Mr. Anastaplo: It has to be unrealistic, because realistically, I say, I see nothing, I expect nothing. But if you insist upon talking about possible conjectures, I have to talk about very unrealistic examples, or else go elsewhere for them.

Commissioner Stephan: I think we are going to have to adjourn.

6. Fourth Session, April 23, 1958.

The session opened with this exchange (R. 169):

Commissioner Stephan: There is just one question I want to get clear in my own mind, and perhaps it troubles other people, too. On the question of possible communist affiliation, is it your position that a question directed to that matter is irrelevant, or that notwithstanding its relevancy, it is an improper question because of protection that you have under the First or Fourteenth Amendment?

Mr. Anastaplo: Well, I would say first of all, that it's an improper question under the Constitution, on the basis of the various reasons that I have given from time to time. I would say, furthermore, that even if it is proper in some cases, some foundation or relevance for the question would have to be shown. Third, I would say, that even if no foundation or relevance has to be shown, a refusal to answer the question for the reasons I have given—mistaken reasons or not—would be only one more piece of evidence in the record, and would be, I would suggest, extremely flimsy evidence in this record, where there is absolutely no [evidence of such affiliation].

Subsequently, petitioner presented an analysis of the problem of how the refusal to answer questions about Communist Party or other memberships had to be interpreted in the circumstances of his case. (R. 174-180) He established, at least to his satisfaction, that anyone refusing to answer affiliations inquiries in the circumstances of petitioner's record (where a denial of memberships could not be impeached) had to be either a non-Communist or an honest and scrupulous Communist, either of which would be eligible for admission to the bar even in the committee's view. He concluded this analysis with the comment (R. 180),

> The analysis I have just made has implications with respect to the due process of law. Your approach is inherently ineffective for the purposes a reasonable man may claim for it. But your approach is all too effective in discouraging your applicants to stand by principles, to speak truthfully to you, and to take seriously constitutional government, personal integrity and the rule of law.[19] These, indeed, are very grave results of what you have done, far graver for the Illinois Bar and the State of Illinois than all of the threats anticipated in the combined efforts of the Communist Party, the Ku Klux Klan and the Silver Shirts of America.

After this subject was exhausted for the moment, Commissioner Young returned to his inquiry of the session before concerning petitioner's belief in a Supreme Being as it related to the validity of petitioner's oath (R. 185). Petitioner's refusal to alter his position of the preceding session—his refusal to indicate whether he did hold such belief in a Supreme Being—finally led to this development (R. 188-189):

> Commissioner Young: Mr. Anastaplo, I read to you this statement from the case of *The Central Military Track Railroad Company* v. *Rockafellow*, R-o-c-k-a-f-e-l-l-o-w, which is in 17 Ill. 541, and reading from page 554:
>
> > "But one having no religion, believing in no God, and not accountable to any punishment for falsehood here, or hereafter, except his own notions of honor, veracity and amenability to criminal justice, cannot be sworn, as no legal, moral, conscientious obligation or responsibility, in the view of the law, can be imposed by an oath, and he may not testify without."
>
> Did you ever consider that?

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[19] See the passage from Brown and Fassett, "Loyalty Tests for Admission to the Bar," 20 U. Chi. L. Rev. 480, 501, reproduced in Note 40 (this Brief).

Mr. Anastaplo: I should like to say a couple of things to that. First of all, what is the year of that case?

Q. Eighteen hundred fifty-six, and I don't find that it has been overruled or modified since then.

A. I would say that, in fact, this ruling is dead law. I think even the most elementary knowledge of Anglo-American law would furnish us with a very clear indication that that simply is not the rule of today. Secondly, I have not spoken to the issue of whether I have or have not religious affiliations. I have not denied the possibility that I have religious affiliations, or that I have eternal sanctions, or sanctions that apply to me in the afterworld. All that I have refused to do on that issue is speak to it.

As Commissioner Young pressed his inquiry, petitioner's protests to the chairman of the examination brought about this exchange (R. 190):

Commissioner Stephan: Nobody has drawn any inferences from what you have said. I don't know why you leap to the conclusion that you are necessarily prejudiced in what you said.

Mr. Anastaplo: From the very tenor and construction of Mr. Young's questions, I am led, simply as a matter of precaution, shall we say, to inquire of you whether this is an issue, whether this raises the problem I should speak to.

Commissioner Stephan: I explained to you that in the course of the proceedings, various questions of a miscellaneous nature have occurred to committee members, which the chair asked them to hold in abeyance until the formal questioning was over with. This is one of them.

Mr. Anastaplo: Mr. Chairman, I am put in a very awkward position. I have to determine—and this is one of the problems of the proceedings of this committee, and always has been—I have to determine, at the risk of my career, which question, by which member of the committee, is going to be taken seriously by the

committee a month from now, or six months from now.

Commissioner Stephan:[20] *I don't know how anybody can tell you that.*

After a recess during which the committee had gone into executive session, Commissioner Young was permitted to press his inquiry about petitioner's oath and religious sanctions (R. 191). Petitioner continued to object, concluding (R. 192),

> Let me also add that we are but one step now away from the old transubstantiation controversies of the last century and the centuries before, in England; that is to say, if you begin to ask questions about one's belief in God, and so forth, or imply that it may be a problem for consideration, it is one step further to inquire into the nature of this God or this belief that you are inquiring into.

Whereupon Commissioner Stephan was moved to respond (R. 192),

> One thing that I think is perfectly clear, and I hope it is to you, and that is that this committee is not exacting a religious qualification for the office of attorney in this state. That is emphatic, and I want it to be absolutely clear both in your mind and on the record.

But Commissioner Stephan and petitioner were in turn confronted by Commissioner Moses (R. 193-194),[20]

> Commissioner Moses: . . . I am giving you [the petitioner] *my own view* that a man who takes an oath without a belief in the Deity, is going through an empty form; he is not in good faith taking an oath; and *I also say* that one who would do that, in my judgment, would be unfit to be a member of the bar. And *I say further*, that if it is more important to him not to reveal his views on that subject, because in his opinion the First Amendment plus the Fourteenth keeps him from having to do so, that bears, *in my opinion, only, as a Commissioner*, upon his fitness, and I want

[20] Italics added throughout.

to give you that information at this time so that you can't feel that I withheld it from you.

Commissioner Stephan: You understand that *those views are the views of Commissioner Moses, and not necessarily the views of the committee.*

Mr. Anastaplo: But this is the problem, that I have to decide whether it is the view of the committee or not.

Commissioner Weiss: At this time, Mr. Chairman, can we go on with other questioning?

7. Fifth Session, May 19, 1958.

This session opened with Commissioner Young acknowledging that the religious sanctions case of 1856 relied upon by the commissioner in the session before had indeed been superseded by a later case. Petitioner moved immediately for a ruling that "the inquiries into my religious beliefs are improper and irrelevant," a motion upon which action was deferred (R. 206). Petitioner also announced that he had prepared some remarks on Commissioner Young's line of questioning about religion and on the commissioner's use, and the committee's acquiescence in the use, of a case that petitioner had learned had been nullified by the 1870 Constitution of Illinois. These remarks were postponed to the end of the session.

In response to inquiries from Commissioner Moses, petitioner indicated again that there might conceivably be circumstances in which he would feel justified in forcibly resisting the enforcement of court judgments or decrees in order to support the Constitution (R. 211). In such extreme circumstances, he said, he would be acting as a citizen, not as a lawyer (R. 212-213). An exchange with Commissioner Sawyier at this point illuminated petitioner's position (R. 215-216):

Commissioner Sawyier: Mr. Anastaplo, under the system of appeal, and so forth, on the questions Mr.

Moses asked you, it isn't very likely, there is only a remote possibility, as I understand it, that any one situation of resistance to a final order would ever be justified?

Mr. Anastaplo: That is true.

Q. I mean, I can understand the situation such as that in Nazi Germany, where a man is arrested and sentenced and although there are appellate courts, and so forth, they are not functioning; is that the kind of situation you have in mind?

A. Yes, but even in Nazi Germany I would be cautious. That is to say, I mean, I think in Nazi Germany, the Jews, just as well as the "good" Germans, as they were called, should have resisted. But I think a prudent guidance of that resistance was also necessary, not blindly or recklessly; I mean, there are times when you have rights which have to be foregone, simply because of social considerations. Even before a bar commission, such as this one, I would say that there are rights which I have defended, which, under other circumstances I might decide not to defend, simply because social consequences that follow might be more harmful to the bar and to the state in my defense. I think that is not the situation in this case.

Subsequently, in response to requests from petitioner, the chairman of the full committee (after the committee had recessed for an executive session), stated (R. 233-234),

Commissioner Thomas: . . . I will add for your information, and for the record, that the question as to whether an applicant is or has been a member of the Communist Party, or of various other organizations, including organizations listed as subversive on the Attorney General's list, has been and currently is, including this spring session, frequently asked of candidates. I can tell you that from my own information, having been a member of the committee for a good many years, participating both in panels, that is in the

initial meetings, with candidates, and also in the participation of the full committee. Now, on the—[21]

Mr. Anastaplo: Before you go on, could I ask a question about that?

Commissioner Thomas: I will add on that, that that question has frequently been asked where there is no indication on the face of the questionnaire, and the answers thereto, or the affidavits, or of the discussions up to that point, as to the man's having been or even suspected of being a member of various organizations of that nature.

Mr. Anastaplo: You mean you ask it, I take it, in most of these cases, out of the blue?

Commissioner Thomas: In many cases it is asked out of the blue. That doesn't exclude the possibility—

Mr. Anastaplo: —the possibility of it being asked for some reason, in other cases.

Commissioner Thomas: Yes, that's right . . .

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[21] Neither Commissioner Thomas nor Commissioner Stephen (R. 79) was a member of the committee when petitioner first appeared before it in 1950-1951. Petitioner submitted (R. 79-80) a memorandum by Mr. Stephen Love to the court below in 1954. Mr. Love (who had once served as chairman of the committee) argued in the course of this memorandum:

> "If the question [about Communist Party membership] is desirable, then the Committee should ask it, or the Supreme Court should indicate the desirability of asking it, of every applicant for admission to the bar; it seems most unfair to submit this applicant to a three hour examination along these lines—particularly when the evidence does not show any Communist activity or sympathy on his part—while subjecting no other applicant to similar inquiries; several thousand applicants have been passed since the inception of the "cold war" without being asked a question along these lines.

Mr. Love also reported in this memorandum:

> [Petitioner] is probably the first applicant in the history of the Committee whose certificate was denied to him on the basis of his opinions rather than on the basis of any overt acts of misconduct.

(Mr. Love, who had been the lone dissenter when the committee first ruled against petitioner in 1951, was no longer a member of the committee which wrote the unanimous 1954 report explaining the 1951 ruling.)

The chairman, at the same time, made the following concession on behalf of the committee (R. 234):

> . . . I will tell you this. That no one has stated to this committee [orally or in writing] that you are or have ever been a communist, or a member of the Communist Party, or a member of the Ku Klux Klan, or a member of the organizations, or any one of the organizations listed as subversive by the Attorney General's list.

Petitioner returned to the problem of Commissioner Young's religious questions, asking that the committee rule such questions "out of order on the basis of this record" before petitioner began his analysis of "the *Rockafellow* situation" (R. 237). This request was refused as beyond the power of any commissioner to comply with. There was then this exchange between the chairman of the examination and petitioner (R. 237-238):[22]

> Commissioner Stephan: It has been pointed out before to you, that *the mere fact that a question is asked* does not indicate that other people would have asked or approved that question, *nor does it indicate that any particular weight will be attached to the answer or failure to answer the question;* do you understand?
>
> Mr. Anastaplo: I will have to speak to that problem. It is a very serious problem, procedurally, and under the rules of the court.
>
> Commissioner Stephan: In the nature of the case because of the nature of the subject matter and the type of hearing we conduct, a great deal of latitude is given both in the manner of questioning, the type of question asked, and in the type of response permitted. I don't think you could feel that you have suffered from the lack of latitude.
>
> Mr. Anastaplo: I'm sorry. I submit, then, that if this is inherent in the committee's procedures, then the procedures of the committee are inherently unfair and I will try to show what I mean.

[22] Italics added throughout.

The session ended with petitioner opening his detailed analysis of Commissioner Young's religious inquiries, and of the legal research exhibited in the session before, particularly as they cast light on the essential irresponsibility of the committee's procedures and on the difficult choices with which vulnerable applicants are often confronted. Petitioner observed (R. 242-243),

> Let me say first of all, I simply cannot see how the committee can operate fairly the way it is proceeding. I take it, as you have indicated already, that the committee permits any commissioner to ask any questions he pleases. No attempt has been made, in my experience, to police the questions. So far as I know, the committee implicitly adopts all questions, never disavows any, and certainly never, whether or not at the request of an applicant, rules any question out of order. Rather, the applicant is forced to decide for himself what is a serious question and what a foolish one, what comes from an informed and responsible, and what comes from an uninformed or irresponsible man. In short, the committee sinks to the lowest level to which any member chooses to take it.

At one point in his statement petitioner conceded (R. 249),

> My suspicion is that in a court of law you are all honorable men, and that you would not permit yourselves to do, or permit your opponents to do the things that you permit yourselves or your fellow members to do to helpless applicants. The procedures and standards you employ make it hard for you, as a committee, to behave the way you expect others to behave towards you in other judicial proceedings. You permit yourselves too much power and divest yourselves of too much responsibility. Almost inevitably you become unfair in both the common sense and the constitutional sense, when you encounter conscientious opposition. I submit to you again, a thoroughgoing reform of committee methods and standards is necessary, a reform

that curbs many of the radical things that you have been doing. . . .

Finally, petitioner predicted accurately (R. 249-250):

> Of course, you might all later decide not to say anything about these religious inquiries in your report to the Supreme Court. You might wash them out of your decision. There is precedent for such selectivity in the 1954 report of this committee to the [Supreme Court of Illinois], in which unanswered questions about membership in the Ku Klux Klan, and in fact about all organizations I might belong to, and about subscriptions to the Daily Worker and the Chicago Tribune were completely ignored by the committee in its report to the Court. This, of course, resulted only in a distortion of the issues and of the nature of our controversy, just as there would be a distortion now if one does not remember my refusal before you to answer questions about membership in the Ku Klux Klan, the Silver Shirts of America, the Republican Party, and the Democratic Party, as well as questions about God and the hereafter, all of which questions I have been asked and have refused to answer.[23]

8. Sixth Session, May 26, 1958.

This, the final session conducted during petitioner's current rehearing, opened with an announcement by the chairman of the examination (R. 256):

> The hearing will please come to order. Mr. Anastaplo, I have been instructed by the Committee to advise you that all matters pertaining to your religious beliefs, or your lack of any religious beliefs, and your failure to respond to questions directed to that subject

[23] The Republican and Democratic Parties inquiries emerged as a result of the attempts by Commissioners Bane and Young to secure an answer about petitioner's political affiliations by exploiting the fact that petitioner had served on several occasions as the official election judge in his Chicago precinct. (R. 22-26, 182-184.) (See, for an appraisal of this episode, Appendix, Pet. Writ. Cert., 63.)

> matter, will be entirely disregarded by the Committee in arriving at its determination as to your character and fitness. . . .

Petitioner thereupon filed with the committee the remainder of his statement on Commissioner Young's religious inquiries, introducing it with the explanation (R. 261-262):

> . . . I believe that I show in the remainder of my statement that the use of the *Rockafellow* case was clearly improper and unfair, and certainly irresponsible, even if it is assumed that the case is still good law. I also indicate, as I have to some extent already, how and why this impropriety, unfairness and irresponsibility, have not only been permitted, but even encouraged by Committee practices and procedures. This Committee has from time to time pointed to its practices and procedures to justify what it is doing or to challenge what I have been claiming. I think it not only necessary, but even legitimate, therefore, to show what is wrong with these practices and procedures, however much of an indictment of the Committee it might seem to you. I believe, therefore, that the *Rockafellow* case incident and your acquiescence in that incident and your questions based upon that case, clearly demonstrate to reasonable men what is wrong with the way the Committee conducts its business. Therefore, the analysis I offer you is vitally necessary, to consider my view of the case. May I, however, continue to stress my willingness to help improve the practices and standards that I am compelled to criticize.[24] I assure you that I would not have gone to all this trouble throughout the years, for my benefit alone.
>
> . . .

Petitioner concluded his discussion of this subject with the following requests to the committee (which have never been granted) (R. 276):

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[24] See petitioner's two letters during the Summer of 1955 to a member of the court below. (R. 418-426)

Now I should like to have you rule in a more formal form than you have, than you did at the beginning of the session, that the inquiries into my religious beliefs were improper and irrelevant under the law of the land and for the purposes of these proceedings. I should further like to have you rule that my refusals to answer these inquiries constitute no adverse evidence with respect to my qualifications for admission to the bar. I understand that, in a sense, some aspects of these two rulings have already been made. I even venture to suggest and request that an even fairer ruling now, and report later to the Court on this point, would be to the effect that such refusals as mine under these circumstances, really constitute highly favorable evidence with respect to bar admission qualification. That is, I assume that the legal profession should encourage applicants for admission to the bar, as well as lawyers, to stand on principle and to resist vigorously official usurpations of authority.

Petitioner, in the course of bringing the hearings to a close, returned to his position on the right of revolution (R. 279-280):

. . . I sometimes rebuke myself for the amount of hair-splitting and refinement in which I have acquiesced in answering your carefully, if not deviously, worded questions about the exact moment in some unforeseeable future when I might conceivably be obliged to exercise the right of revolution. Really, all this is unbecoming. Can you gentlemen deny that you believe in the right of revolution as much as I do? Do you dare admit that you would sit idly by if tyranny comes, or, if you would sit by, do you say you would see something immoral or unfit in those of your fellow citizens who strive to re-establish constitutional government, or to protect it before it is torn down? Certainly you cannot believe what your cautious questions and timid formulations would suggest you believe. I put it to you, there is nothing I have said about the right of

revolution that all of you who have thought about the matter do not also believe in. Let us throw caution and timidity to the wind for the moment and indulge ourselves in the proud proclamations of a free spirit.

Permit me to read to you two excerpts from a lecture on law, in 1790, by Justice James Wilson of the United States Supreme Court, one of the authors of the Constitution. These excerpts are reproduced in my closing argument as well, but they bear repetition, considering how much we have questioned our heritage these last few months. Mr. Justice Wilson says at one point, to an audience that included President Washington—and here I quote: " . . . the principles of our Constitutions and governments and laws are materially better than the principles of the constitution and government and laws of England. Permit me to mention one great principle, the vital principle, I may well call it, which diffuses animation and vigor through all the others. The principle I mean is this, that the supreme or sovereign power of the society resides in the citizens at large; and that, therefore, they always retain the right of abolishing, altering, or amending their Constitution, at whatever time, and in whatever manner, they shall deem it expedient." And again a few minutes later Mr. Justice Wilson reminds us of dogma we should not have forgotten. Again I quote: " . . . a revolution principle certainly is, and certainly should be taught as a principle of the constitution of the United States, and of every State in the Union. This revolution principle —that, the sovereign power residing in the people, they may change their constitution and government whenever they please—is not a principle of discord, rancor or war: it is a principle of melioration, contentment, peace. It is a principle not recommended merely by flattering theory; it is a principle recommended by happy experience."

May I once again assert that I have never said anything about the right of revolution that did not spring from the sentiments embodied in the Declaration of Independence. I must continue to defend that Dec-

laration, even if it means my continued exclusion from the bar of this State. . .

Subsequently, in the course of this final session, there was this exchange between petitioner and the chairman of the examination (R. 294-295):

Mr. Anastaplo: Are you prepared to say at this time what questions, if any, that I refused to answer in the course of this rehearing, seem to raise problems for the Committee with respect to my character and fitness, and if so, why such particular questions, if any, do raise problems? This is not necessarily a ruling, but simply a matter of information to guide my further conduct in the course of this rehearing.

Commissioner Stephan: We have gotten into several areas where the persistence of the questioning and the character of the questions and the warning that you have been given from time to time about the materiality of the questions, should make clear the answer to the question you put to us now. I certainly would not at this time attempt to review a three or four hundred page record and tell you what question we thought was relevant and which one wasn't. I think you know the main areas of inquiry, and I think your suggestion is not a feasible one.

Mr. Anastaplo: I see. You mean, nothing stands out in your mind right now that you would care to point to as particularly important?

Commissioner Stephan: There are several things that stand out in my mind.

Mr. Anastaplo: You would not want to state what they are?

Commissioner Stephan:[25] I don't think I would, no. *I don't know what stands out in other people's minds. These are matters that the Committee will get into when it reviews your case.*

[25] Italics added.

The final session of petitioner's appearance before the committee concluded shortly thereafter with the delivery of petitioner's Closing Argument, which he outlined in this manner (R. 312-313):[26]

> The closing argument and brief that I should now like to submit to you may be conveniently divided into thirteen parts. After my introductory remarks, I propose to consider generally the record on character and fitness, and then my character references and affidavits. Thereupon, I will speak of the Declaration of Independence, first as it relates to the history of this case, then as it affects the decision in 1954 of the Illinois Supreme Court. This will be followed by a discussion of the lack of foundation in this record for the affiliations inquiries. I propose then to make a survey of the constitutional arguments I present, before proceeding to discuss, first, the significance of the Konigsberg case record, and then the relevance of the Konigsberg decision. I should thereupon like to say a few words about the current challenge to republican government, before going on to some remarks about the American scene and about the role of the American bar in our time. After making some appropriate closing remarks, I will have done my duty and you will be left with yours.

9. After the Sixth Session, May, 1958 to January, 1960.

Four months after the conclusion of petitioner's examination before the committee, petitioner was informed by the committee (on September 16, 1958) that if he wished to comment on the then recent cases of *Beilan* v. *Board of Education*, 357 U.S. 399, and *Lerner* v. *Casey*, 357 U.S. 468

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[26] The Closing Argument, which is found at R. 314, has been reprinted in its entirety in Volume 19, Number 4, of The Lawyers Guild Review. The majority and minority opinions of the character committee have been reprinted in Volume 19, Number 2, of the same publication.

("which may have some bearing on your pending application for admission to the bar of this state"), he might do so (R. 441):

> . . . The Committee wishes to be advised whether, in the light of such decisions, you wish to change, modify or supplement any answers which you have given to the Committee's questions or alter your testimony in any other regard.

Petitioner's answer, of September 23, 1958, consisted of a detailed analysis of the significance and relevance of these cases with respect to his application. One of the points he made is set forth in this passage (R. 443-444):

> It should be appreciated that the *Beilan* and *Lerner* cases really add very little to the law as it has been laid down by the Supreme Court of the United States since long before the *Konigsberg* and *Schware* cases. The Court, in the *Beilan* and *Lerner* opinions, relies for the most part on the cases of *Adler* v. *Board of Education*, 242 U.S. 485, and *Garner* v. *Board of Public Works*, 341 U.S. 716. These latter cases, involving *public employees*, were before the Court when it passed on the *Konigsberg* and *Schware* bar admission matters. I do not believe the Court even mentions the *Adler* and *Garner* cases in the *Konigsberg* and *Schware* opinions, a silence which suggests that we are dealing with two different lines of cases here, one relating to public employment, the other to bar admissions.
>
> . . . in the *Beilan* and *Lerner* cases, the Supreme Court seems once again to have emphasized the doctrine of the *Adler* and *Garner* cases that for a public employee to refuse to answer a question deemed relevant may justify dismissal.
>
> The *Garland, Cummings, Schware* and *Konigsberg* decisions, on the other hand, indicate that different standards are called for when the area of public employment is left and that of bar admission is entered. Similarly, the Committee has acknowledged that a refusal to answer inquiries deemed relevant at one time

> or another in the course of a bar admission proceeding is not, in itself, sufficient to exclude an applicant from the bar: the Committee conceded, for instance, after I had persisted in refusals through several sessions and for several weeks, that I could without penalty refuse to answer the questions about religion that had been so strongly pressed upon me. . . .

Another point had to be emphasized in petitioner's letter (R. 446):

> . . . In the *Lerner* and *Beilan* cases, there is a more or less formal reliance by the penalty-exacting State upon refusals to answer two questions; there seems to be little else in the way of inquiry in the records.
>
> The Committee, on the other hand, has a four-hundred page transcript in which the justifications, purposes and relevance of the unanswered questions are, to say the least, shown to be questionable. It is a record with no adverse evidence and with more than enough positive evidence not only to sustain but even to require a finding favorable to my application.
>
> In order to rely on the *Beilan* and *Lerner* cases to deny my application, the Committee would have to claim that the hearings should have been concluded after the first unanswered questions (which happened to be about religious affiliations [R. 16], or soon thereafter when the first political questions were left unanswered [R. 28]) . . .

Much is made in the committee's majority report of petitioner's refusal to abandon his position after the committee's letter about these cases (Appendix, Pet. Writ. Cert., 20, 27). The committee neglects to mention that petitioner's refusal was one that was carefully argued, not the arbitrary disregard of the committee's inquiry which is suggested by the two-word sentence, "He declined." (Appendix, Pet. Writ. Cert., 20) This exchange of letters, and the committee reaction to it, prompted Professors Harry

Kalven, Jr. and Roscoe T. Steffen to comment in their *amici* brief filed in the court below (R. 508),

> In view of the Committee's own handling of the *Beilan* and *Lerner* precedents, it adds a note of irony to the record that the majority made so much of Anastaplo's intransigence in failing to capitulate to their reading of the two cases.

It was not until a year after petitioner's final appearance before the committee that a decision was announced by the committee (April 9, 1959),[26a] with eleven members voting against recommending petitioner for admission to the bar and six voting in his favor.[27] The decision of the committee

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[26a] "I also fail to perceive the necessity for the delay of an entire year between the conclusion of the hearing and the decision of the committee." Mr. Justice Bristow, dissenting (Appendix, Pet. Writ. Cert., 64).

[27] A week after receiving the committee's report, petitioner wrote (on April 16, 1959) to the committee chairman asking that the committee officially acknowledge the following information (R. 474):

> Since receiving this Report, I have been informed that at least three members of the Committee majority have made inquiries of or discussed my matter with members of the Chicago bar who have known me for some time. These inquiries related to my background, character and activities, as well as to other topics. I have reason to believe that Committee members were given nothing but favorable information about me on these and other occasions.

The chairman replied (R. 475):

> The Committee has considered your request and deems it inappropriate that such inquiries be made of the individual members. The decision of the Committee was made solely on the record before it, which has been closed and sent to the Supreme Court.

Additional information on this point is reported in petitioner's 1959 brief in the court below (at pages 16-17):

> . . . The Committee does not—it cannot—deny the information [about inquiries made by members of the committee] that I happened to be given. In fact, since writing to the Chairman I have received additional information about more contacts of the kind I describe in my letter of April 16. It even seems that individuals who had submitted character affidavits on my behalf

was affirmed in the court below by a vote of 4-3 (November 18, 1959; January 21, 1960).

The court below opened its *per curiam* opinion with a review of its 1954 opinion denying petitioner admission to the bar.[28] Thereupon, after indicating the evidence before

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were questioned about me by individual members of the Committee who were either acting officially or improperly (Committee Rule 15 [R. 370]).

The real complaint of the Committee is not that it cannot learn enough about me, but rather that it cannot learn anything adverse to my application. It seems to think that unless something derogatory is turned up, it is not relevant evidence. As a result, favorable evidence is suppressed or ignored. . . . The rules of fair play and due process require that the members of the Committee be obliged to acknowledge the favorable evidence that they have turned up in their individual inquiries: they sit as commissioners of the Court in a judicial capacity, not as counsel permitted to introduce only evidence favorable to their clients.

(See, also, R. 49-50 and the discussion, in petitioner's letter of March 27, 1958 (R. 115-116), respecting an earlier investigator's report suppressed by the committee.)

Related to this problem is the comment on the committee report by Professors Kalven and Steffen in their *amici* brief (R. 501),

. . . The majority seems to intimate that somewhere, someplace, there surely must be some evidence of disloyalty or of bad reputation, but the fact is that in seven or eight years of investigation and inquiry, nothing of the sort has come to light.

[28] Since the author of the *per curiam* opinion drew as much as he did on the language of his earlier opinion in this 1959 review of the earlier (1954) opinion, he repeated the serious error as to the order of inquiries directed to petitioner in his first (1950) appearance before the committee. (Compare 3 Ill. 2d, at 473-474; Appendix, Pet. Writ. Cert., 35.) This error was repeated despite petitioner's emphasis on this error both in his Closing Argument (R. 320-331) and in his brief before that court (p. 18). The fact remains, the significance of which the court below has yet to consider, that the sequence of inquiries was exactly the reverse of that described in its 1954 and 1959 opinions: questions about affiliations came only after petitioner's answers about the right of revolution and only because committee members were hostile to the legitimate opinions on the subject of rightful rebellion that petitioner had expressed on request. See, Sharp, "Freedom and a Free Bar," 17 Lawyers Guild Rev. 43; Note, 50 Northwestern Univ. L. Rev. 94.

the committee, the court below reported (Appendix, Pet. Writ. Cert., 39),

> During the interval between denial of his original application [in 1951] and the submission of his second application, Anastaplo had been employed the greater part of the time as an instructor and research assistant at the University of Chicago. The character affidavits and letters of reference supplied by Anastaplo discloses that he is well regarded by his academic associates, by professors who taught him in school and by lawyers who are personally acquainted with him. The committee says that it had not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation, and that it has received no information from any outside source which would cast any doubt on Anastaplo's loyalty or which would tend to connect him in any manner with any subversive group . . .

The court below went on to say about petitioner's views on the right of revolution (Appendix, Pet. Writ. Cert., 39-40),

> The committee conducted an extensive inquiry into Anastaplo's belief in the right to overthrow the government by force and violence. His testimony in this regard does not require narration since a majority of the committee concluded that while the views expressed by Anastaplo, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not and of themselves reveal any adherence to subversive doctrines. . . .

Reservations were immediately expressed thereupon, however, about a concrete instance of the exercise of this right of revolution—about, that is, petitioner's refusal to say

that he would, in all circumstances, obey all judicial decrees: his attitude on this problem seemed to

> raise a serious question whether the attitude expressed by Anastaplo toward final court determinations binding upon himself and toward attempts to enforce them conformably to the law is consistent with the oath required of attorneys in this State. An attorney is an officer of the courts. (*In re Day*, 181 Ill. 73.) In *Cooper* v. *Aaron*, 358 U.S. 1, 3 L. ed. 2d 5, the United States Supreme Court said, at page 8: "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." [Appendix, Pet. Writ. Cert., 41]

The court below then turned to what it called, "The major issue presented to the committee [which] arose from the applicant's continued refusal to answer questions regarding possible Communist or other subversive affiliations" (Appendix, Pet. Writ. Cert., 41), and reaffirmed its 1954 assessment of Communist Party membership (Appendix, Pet. Writ. Cert., 42),

> It is our opinion, therefore, that a member of the Communist Party may, because of such membership, be unable truthfully and in good conscience to take the oath required as a condition for admission to practice, and we hold that it is relevant to inquire of an applicant as to his membership in that party. . . .

The opinions of this Court in *Orloff* v. *Willoughby*, 354 U.S. 83, *Lerner* v. *Casey*, 357 U.S. 468, and *Beilan* v. *Board of Education*, 357 U.S. 399 (all cases dealing with qualifications for some form of government service) were mustered in support of the position of the court below that (Appendix, Pet. Writ. Cert., 42-43),

> . . . questions as to membership in the Communist party or known subversive "front" organizations

were relevant to the inquiry into petitioner's fitness for admission to the bar. His refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate.

Further support was sought in the opinions of this Court in *Barenblatt* v. *United States*, 360 U.S. 109, and *Uphaus* v. *Wyman*, 360 U.S. 72 (both cases dealing with the extent of power of government to make a "subversive inquiry") (Appendix, Pet. Writ. Cert., 50).

The court below concluded its opinion with the observation (Appendix, Pet. Writ. Cert., 52-53),

> The Committee on Character and Fitness drew no inference of disloyalty or subversion from Anastaplo's consistent refusals to answer questions concerning Communist or other subversive affiliations. We agree with the committee that a strong public interest supports the interrogation of applicants for admission to the bar on their adherence to our basic institutions and form of government and that this public interest in the character of its attorneys overrides an applicant's purely personal interest in keeping such views to himself. In the light of *Barenblatt* v. *United States*, 3 L. ed. 2d 1115, 79 S. Ct. 1081, alone, the relevancy of an inquiry as to whether an applicant for admission to the bar is a member of the Communist Party is no longer debatable. Decisions of the United States Supreme Court since *In re Anastaplo*, 3 Ill. 2d 471, fortify our earlier conclusion that a determination as to whether an applicant can in good conscience take the attorney's oath to support and defend the constitutions of the United States and the State of Illinois is impossible where he refuses to state whether he is a member of a group dedicated to the overthrow of the government of the United States by force and violence. By failing to respond to the higher public interest, Anastaplo obstructed the proper functions of

the Committee on Character and Fitness. By virtue of his own recalcitrance he failed to demonstrate the good moral character and general fitness to practice law necessary for admission to the bar of this State.

Vigorous dissents were filed by three members of the court below, who placed heavy emphasis on the record in this case. Thus, Mr. Justice Schaefer and Mr. Justice Davis open their dissenting opinions with the acknowledgment (Appendix, Pet. Writ. Cert., 78),

> As a result of the exhaustive hearings before the Committee, we now have far more information as to the moral quality, the legal capacity and the political views of this applicant than is ordinarily the case.

And Mr. Justice Bristow concludes his detailed analysis of the *per curiam* opinion with the following appraisal (Appendix, Pet. Writ. Cert., 77-78):

> Anyone reading this record, whether or not he agrees with George Anastaplo's interpretation of his constitutional rights, cannot come away without being impressed by his adherence to truth and what he regards as basic principles of good citizenship. His refusal to answer certain questions is not in fear of the truth, but rather in defense of what he believes to be the truth—that a citizen, particularly a lawyer, has a duty to defend constitutional principles, "even at the risk of incurring official displeasure." His restrained and well mannered testimony and conduct at the hearing corroborate fully the glowing evaluations of his character and reputation in the affidavits submitted to the committee.
>
> On the basis of this entire record, it is my opinion that there was substantial evidence of George Anastaplo's good moral character, which was in no way marred by a single item of evidence from which the committee could reasonably conclude that there were doubts about applicant's honesty, fairness and respect for the rights of others or for the laws of the nation.

Under these circumstances, the committee's action denying applicant admission to the Illinois bar on the basis of its finding that he failed to establish good moral character, constituted a denial of due process of law under the decisions of the United States Supreme Court, and should properly have been rejected by this court.

After an unsuccessful attempt on the part of petitioner to "settle out of court" without sacrifice of principle (Appendix, Pet. Writ. Cert., 81-82), the controversy was brought by him to this Court on writ of certiorari.

SUMMARY OF THE ARGUMENT.

This case may be understood as an extended debate between petitioner and representatives of the Illinois bar about the kind of men America needs. It certainly cannot be understood if it is regarded as concerned with the character of the Communist Party or the Ku Klux Klan or with the qualifications of the members of such organizations to practice law.

The involved debate recorded in the transcript may be reduced, for judicial purposes, to a series of practical questions: What is the legitimate function of a Committee on Character and Fitness? Did *this* character committee perform its appointed task? If not, is it because the committee was denied evidence which it had both a right and an obligation to have before it could assess petitioner's qualifications for admission to the bar? Finally, and most important, is the petitioner of this record in fact qualified for admission to the bar?

The long record, behind which lies a decade of association between petitioner and the character committee, is so favorable on character and fitness grounds, in the usually accepted sense of these terms, that the refusal of the com-

mittee to be bound by it is so unreasonable and arbitrary as to constitute a denial of petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment. The committee suggests two justifications for its refusal to be bound by the evidence: (1) petitioner's views on the right of revolution (as expressed in his recognition of the validity of resistance even to court decrees under certain extreme circumstances); (2) petitioner's refusal on principle to answer certain questions about so-called "subversive" political affiliations (affiliations with organizations such as the Communist Party and the Ku Klux Klan).

Petitioner's views on the right of revolution, which includes the right to resist tyrannical acts, whether they take the form of court decrees or legislative enactments, are perfectly proper, and indeed are sanctioned for Americans by the Declaration of Independence. Petitioner's refusals to answer certain questions are based on constitutional and other principles and relate to organizations which the committee admits it does in no way associate with petitioner. Thus, neither of the excuses offered by the character committee should be permitted to justify the committee's refusal to be bound by the evidence as to petitioner's qualifications for admission to the bar. Indeed, the stand petitioner has made in the face of official disapproval and at the cost of his career at the bar—a stand in defense of the Declaration of Independence and in opposition to what he considers improper, bullying and unwarranted inquiry—really reinforces the other evidence in a record already favorable to his application for admission.

Further objections lie under the due process and equal protection clauses to the questions about political organizations asked by the committee and to the kind of hearing conducted by the committee. The political questions, which

are not of the kind usually regarded as appropriate and relevant for "character and fitness" adjudications, require some foundation in the record, especially since they seem on their face to invade constitutionally protected domains. Whether or not a foundation is deemed to be required, however, it seems that some showing should be made that the specified unanswered questions are vital or necessary before a claim can be made that they obstruct indispensable inquiry, especially when, as here, there are several other unanswered questions[29] that the Illinois authorities neglect to mention. Even if there should have been demonstrated the propriety of and need for the specified unanswered questions, it is argued by petitioner that a refusal to answer them should be considered only one more item of evidence in the record, not the obstructive element the committee would now make it out to be. Besides, the context of such "obstruction" cannot be ignored: it occurred in the first hour of a hearing which continued through several more months and for twenty more hours and it occurred with respect to organizations which the committee was obliged to admit it does not suspect petitioner of affiliation with. It is no wonder, then, that the committee minority concludes its dissent (Appendix, Pet. Writ. Cert., 33),

> We now know the applicant is fit and of good character. On this record, it is pure sophistry to hold that his refusals to answer have prevented our determining his character and fitness. To deny admission under these circumstances would be a disservice to the Bar and a violation of the traditional concepts of fairness

[29] About religion (see Note 61, this Brief); about doctrines identified by committee members as "Marxist" and "Leninist" (see, *e.g.*, R. 81, 155-156); ad about Republican and Democratic Party affiliations (see Note 23, this Brief).

and due process. To do so under the shelter of burden of proof is a retreat to formalism we are unable to join.

The *Konigsberg* and *Schware* cases, furthermore, seem to be applicable to petitioner's case. And yet, the Illinois authorities have attempted to distinguish the former and have virtually ignored the latter. If these cases are still authoritative, petitioner should be able to enjoy the benefit of their rationale; certainly, there is no substantial reason for distinguishing them to petitioner's disadvantage.

Even more basic than the foregoing arguments in petitioner's array of constitutional objections to the action of Illinois are those that rely on the First Amendment. It is only realistic to recognize that petitioner has been abridged of his freedom of speech from the beginning of his conflict with the Illinois bar in that he has been penalized for his views on the Declaration of Independence and the right of revolution. (Indeed, he was first asked questions about possible affiliations only after and only because of his defense of the principles of the Declaration of Independence.) In addition, petitioner argues that the right to refuse without penalty to answer questions about political organizations is protected by the First Amendment. It is most fitting that there should be such protection when the questions are foreign to the purpose of the state agency making the inquiries and when that agency concedes it has no evidence connecting the citizen affected with any allegedly subversive organization. In fact, the concession of the committee emphasizes the role that petitioner's views on the right of revolution have played in the committee's action against him.

Petitioner's position in resisting questions about political affiliations should be familiar as an expression of the historic and respected opposition to test oaths. Such oppo-

sition has been as likely among the "innocent" as among the "guilty". He asks that this opposition be regarded as a citizen's mode of speech appropriate to the occasion, as his protest against unconstitutional, ungentlemanly and harmful practices.

Whatever the validity of petitioner's views on the Constitution and on the needs of the bar and country, there is no reason why any erroneous opinions he may have expressed on these subjects should be taken as diluting in any way the affirmative case on his behalf as an applicant for admission to the bar. If anything, petitioner is to be commended, not censured, for having tried to induce men to act better than is their wont.

Finally, it is argued, this Court, as the supreme judicial body of the land, should review the standards and practices of state bar admission agencies not only for their constitutionality but for their wisdom as well. At least, it is suggested, the remedy of direct admission to the bar of this Court should be available in unusual cases: action of this kind would seem particularly appropriate in a situation such as this where an individual who has been denied admission to a state bar under unprecedented circumstances has clearly demonstrated his overall qualifications for the practice of law.

THE ARGUMENT.[30]

Introduction.

It is well to emphasize at the outset what should be apparent from the Statement of the Case, that the question of membership in the Communist Party or in the Ku Klux Klan is not an issue in this case, but at most only the effect in a bar admission case of a conscientious refusal to answer inquiries about such membership when it is conceded that there is no allegation or evidence of membership, when the inquiries occur only in the context of badgering about philosophical and political views, particularly views about the right of revolution, and when silence is couched in the form of a refusal to submit to something deemed by petitioner to be in the nature of a test oath and to be improper, ungentlemanly and unconstitutional inquiry.

The Illinois bar authorities knew as early as June 25, 1957 that petitioner would, in the event of a rehearing, maintain the position he had held since November 10, 1950: that is, he would continue to defend the Declaration of Independence and he would continue to refuse to answer questions about political affiliations.[31] Nevertheless, on

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[30] The main lines of petitioner's position are set forth in the text of the Argument. It is possible to follow this text without reference to the footnotes. The sometimes repetitious footnotes are, for the most part, useful elaborations of points made in the text. Petitioner has elected to proceed in this manner rather than leave in doubt the main thrust of his attack.

If, in his use of long footnotes, petitioner exhibits the failing of an academician, he must plead in justification the regret that he has never been permitted to become a lawyer. If, in his attack upon the committee and in defense of himself, he is self-righteous and even tiresome, he must apologize for having become too much of a lawyer.

[31] Petitioner's Supplementary Petition for Rehearing, June 25, 1957. (R. 484-490)

September 17, 1957, a reexamination of petitioner's qualifications was ordered by the court below (Appendix, Pet. Writ. Cert., 7); and, from February to May 1958 there was conducted what may have been the longest bar admission examination in Illinois history.

Now, the State of Illinois presumes to claim that petitioner's "refusal to answer [the questions he had announced he would not answer] has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate" (Appendix, Pet. Writ. Cert., 43). This claim is hardly plausible and certainly not fair. The Illinois bar authorities should have denied a rehearing and taken their present position on June 26, 1957—that is, immediately upon learning that petitioner would not alter his position. They could then have claimed with somewhat more plausibility that petitioner's announced position seemed to them to obstruct further proceedings.

The Constitution and the rule of law demand that the Illinois bar authorities be bound by what they have learned about petitioner: twenty-two hundred dollars worth of record printing suggests anything but an obstructed inquiry.[32]

I. Due Process and Equal Protection.

A. The significance of the record.

Much is made by petitioner of the record simply because the central issue is that of his character and fitness for

[32] Some applicants are deemed by the committee to have been sufficiently "tested" for general fitness and good citizenship for bar admission purposes in appearances that last only five minutes before a subcommittee of two members (R. 227). See, also, Note 33 (this Brief).

the practice of law. This is an issue about which the record seems remarkably unambiguous.

The entire record, except for the effect of petitioner's refusal on principle to answer certain kinds of question, would generally be conceded as portraying petitioner as a man who has the "character and fitness" required of a lawyer. This record provides not only highly favorable affidavits from distinguished Americans (R. 388-414) and a lengthy examination of petitioner's career and thought, but it also affords the reader an opportunity to assess petitioner as he is revealed in almost two dozen hours of intensive and sometimes hostile examination before a large tribunal of experienced and well-prepared lawyers (R. 2-366). Certainly, there is nothing in the record to support any reasonable doubt about petitioner's good character or about his support of the Constitution.[33]

It should be remembered that the record is devoted to an applicant who had been before the same committee for almost a decade: the case had been publicized throughout the state in which petitioner lives; committee members were familiar not only with petitioner but also with his teachers, classmates, academic colleagues and friends. In addition, numerous informal inquiries about petitioner were made before and during the year that intervened before the committee announced its decision (Notes 27, 54, this Brief). In short, the committee knew quite a bit not only about petitioner but also about many who know him well—and yet there is no evidence in the record unfavorable to his qualifications as a lawyer.

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[33] See Note 32 (this Brief). The seriousness with which the "burden of proof" is usually regarded in Illinois bar admission matters is also reflected in the fact that, during the ten-year period, 1938-1948, only eight out of a total of 3,805 applicants were rejected on the recommendation of the Committee on Character and Fitness for the First Appellate Court District of Illinois (which sits in Chicago). Shaforth, "Character Investigations," 18 Bar Examiners 194, 198 (1949). See, also, Note 35 (this Brief).

It is not surprising, then, that the members of the committee do not have any serious doubts about the character and fitness of petitioner. They may challenge his judgment and deplore his "recalcitrance" but they cannot bring themselves to express any reservations about his character and fitness in the ordinary or traditional sense. The most they can do—and this they do—is refuse to acknowledge the dictates of common sense which would concede petitioner's evident eligibility. *Haec non turpe est dubitare philosophos, quae ne rustici quidem dubitent?*[34]

It is unnecessary and unseemly to say much more than this about the qualifications of petitioner to practice law: fortunately, the record, which is readable, speaks for itself.[35] Even the evidence which may appear to some as unfavorable to petitioner—his long-standing refusal to answer any questions about possible affiliations in political,

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[34] Cicero, *De Officiis*, Book III, Cap. xix.

[35] The following passage seems to state the generally accepted conception of "burden of proof" (*Coleman* v. *Watts*, 81 So. 2d 650, at 655 (Florida Supreme Court, 1955)):

> Although the burden of proof is always upon the applicant to "satisfy the Board of his or her moral standing," we have the view that when he has made the *prima facie* showing required by the statutes and rules governing admission to practice [law], "it is incumbent upon those making objections to offer evidence to support the same and to overcome the *prima facie* showing made by the applicant. It is not for the applicant to prove the falsity of the charges made against him." While the burden of proof never shifts, the burden of proceeding does.

Petitioner has maintained that

> . . . a *prima facie* case with respect to my character, fitness and ability and willingness to take the required constitutional oath as attorney has been established by my recent application and associated character references and affidavits. May I once again urge the Committee, in the interest of constitutional government and fair play, to restrict themselves to their proper function and to proper means in testing that *prima facie* case. I myself plan to cooperate as much as I can with any legitimate attempt by the Committee to inquire into my character and fitness . . . [Letter to the Committee, March 3, 1958, R. 67-68].

quasi-political and religious organizations—must be evaluated in its context: in fact, this refusal may well be evidence highly favorable in any just estimate of the qualifications of one who aspires to enter a profession which is pledged to take seriously the demands of justice, of honor and of the Constitution.[36] In this connection, petitioner's Closing Argument of May 26, 1958 before the Committee on Character and Fitness must be mentioned: that comprehensive statement presents and illuminates the context in which petitioner has been privileged to render a public service (R. 314-365).

The Committee's refusal to be bound by the record has constitutional implications: the evidence in this long record is so overwhelmingly, and in fact so exclusively, in petitioner's favor and the committee's decision is so unreasonable and arbitrary a disregard of that evidence and of the duty given it by statute that a serious violation of the due process clause of the Fourteenth Amendment has resulted. Or, to use the language of the concurring opinion in the *Schware* case, 253 U.S. at 249,

> Refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause.

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[36] Professors Kalven and Steffen, in their *amici* brief, observed (R. 498-499),

> We realize that the issue raised by the Applicant's stubbornness has its perplexities. We understand, of course, that admission to the Bar is a privilege to be granted by the State, on a satisfactory showing of good moral character. But we are convinced that Applicant has long since met any burden of proof in that regard. Indeed, his very adherence in this matter to what he regards as basic principles of good citizenship is a sure testimonial that he possesses in more than average degree the qualities of independence, intellectual honesty and moral courage that are the glory of the true lawyer.

(All references to an *amici* brief are to the 1959 brief filed by Professors Kalven and Steffen in the court below (R. 498-510), not to the 1960 brief prepared by them for the American Civil Liberties Union, Illinois Division, while this Brief on the merits was in page proofs pending receipt of the printed record.)

This sentiment, it is submitted, is but a recent manifestation of the interest that this Court has always had in correcting a "manifest wrong in the result" of a particular case. *Clyde* v. *Gilchrist*, 262 U.S. 94, 97.

The character committee's task, it is well to remember, is not to pass on the political opinions or affiliations of applicants for admission to the bar; its task is not even that of keeping out of the profession members of the Communist Party or of the Ku Klux Klan. Rather, the committee's task is limited to determining whether an applicant is likely to display as a lawyer

> . . . those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character."[37]

In the final analysis, it should be irrelevant what questions of a political tendency remain unanswered or for what reasons[38] some questions are not answered if a committee has in the record at the conclusion of its investigation both considerable favorable evidence with respect to an applicant's qualifications and nothing else, not even suspicions or rumors, of an unfavorable tendency.[39]

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[37] *Schware* v. *Board of Bar Examiners* (concurring opinion), 253 U.S. 232, at 247.

[38] So long as the reasons are not frivolous or otherwise contemptuous.

[39] The committee majority reports (Appendix, Pet. Writ. Cert., 24-25),

> Because the applicant has refused to answer questions, we are unable to report whether his activities since the denial of his original application have included membership, office holding or other activities in the various organizations listed on the Attorney General list of subversive organizations. We are also

In this matter, petitioner is fortunate to have had the irrelevance of the unanswered questions emphasized by the concession the committee was obliged to make (R. 234):

> . . . no one has stated [orally or in writing] to this Committee that you are or have ever been a Communist or a member of the Communist Party, or a

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unable to report what his reputation is among the members of any organization with which he may be affiliated, since he has declined to inform us of his affiliations.

But what difference would it really make if the committee could not report on *this* issue? For, as Mr. Justice Bristow points out, this has never been the committee's assignment (Appendix, Pet. Writ. Cert., 64, 67, 74).

Several thousand applicants have been admitted to the bar in Illinois since petitioner was denied admission. (See Notes 21, 32, 33, this Brief.) On how many of them has the committee been able to report "whether [their] activities have included membership, office holding or other activities in the various organizations listed on the Attorney General's list of subversive organizations"? Why then must this be made an issue here? What showing or foundation is there, aside from the facts that petitioner had defended the Declaration of Independence and that he had resisted what he regarded as improper inquiry, to justify the insistence upon this issue in a character and fitness inquiry? No, petitioner did not obstruct the inquiry; rather, the committee perverted it.

Even so, the committee majority had in effect already reported even on this misconceived issue. For, earlier in the same report, it had conceded (Appendix, Pet. Writ. Cert., 11-12),

> . . . We have not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation. We have received no information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group.

What more could the committee have said if petitioner had explicitly denied membership in "any subversive group"? Since the committee had never received any information adverse to petitioner, it would have had to accept petitioner's denial unless it had doubts (on other grounds) about petitioner's character or reliability. The issue then resolves itself into the question of petitioner's character and fitness, where petitioner is content to leave it and to which the committee should return.

(See, in this connection, petitioner's analysis of the problem of how the refusal to answer questions about Communist Party or other memberships had to be interpreted in the circumstances of his case. R. 174-180).

> member of the Ku Klux Klan, or a member of the organizations or any of the organizations listed as subversive by the Attorney General's list. . . .

In short, the committee is acknowledging that it has no reason for insisting upon, or even asking, questions relating to these organizations of petitioner[40]—no reason that it is willing to acknowledge publicly. This qualification must be added because there *are* two reasons why the committee has pursued and insisted upon this line of inquiry: first, certain excitable committee members found and continue to find something suspicious and perhaps even subversive in petitioner's views on the right of revolution and the Declaration of Independence;[41] second,

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[40] Questions about organizational affiliations seem to be asked at this time on a hit-or-miss basis by members of the committee (R. 79-80, 233). Nothing is said about them on the standard questionnaire form or in the committee rules (R. 371, 366). In 1950, when petitioner first went before the committee, such questions were asked only of applicants who gave the "wrong" answers to one of the opening questions such as, "Do you think a member of the Communist Party is eligible to practice law?" (R. 320-331). (See Notes 15, 21, this Brief). The atmosphere of that Korean War period, which has affected the attitude of the committee with respect to petitioner ever since, is indicated in a survey conducted at that time which is reported in Brown and Fassett, "Loyalty Tests for Admission to the Bar", 20 Univ. Chi. L. Rev. 480 (1953). One passage (at 501) suggests the bad influence upon character that the character committee has permitted itself to exert:

> . . . The affair [of petitioner] made a considerable impression on his contemporaries at Chicago, one of whom wrote as follows: "Although I have never been a Communist nor a member of organizations on the Attorney-General's list, my attitudes are such that had I acted with complete sincerity, I would not have replied 'no sir' to the question I was asked [about membership in subversive organizations]. But, I decided in advance, as did most of my friends, to give the answers best fitted to admission to the Bar without difficulty."

[41] Something of this attitude on the part of committee members was seen during the current rehearing in the development of the religious questions which, but for the carelessness of the commissioner

the Illinois bar cannot bring itself to admit that a law student who has been "recalcitrant" and hence penalized for a decade might have been right (or at least qualified to practice law) all along.[42]

These are not reasons that can be admitted by the committee with propriety and with any chance of success with reasonable men. But, on the other hand, it cannot be seriously argued on this record that the committee is unable to form a judgment on petitioner's qualifications until he answers all questions asked of him; nor can it be maintained that petitioner is simply obstructing this proceeding. Certainly, it has never been suggested that Illinois has any kind of rule which requires applicants, on pain of exclusion from the bar, to answer all questions put during the character inquiry;[43] there were many questions asked of petitioner—the most blatant of which had to do with religion—which he steadfastly refused to an-

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who relied upon the *Rockafellow* case, 17 Ill. 541, might have been even more serious than they were (R. 187-190, 192-194, 256). Still, it should be noted that every commissioner who insisted in the course of the proceedings upon any question on whatever subject—upon any question which petitioner refused to answer—voted against petitioner at the end of the proceedings (even after the committee chose either not to mention his particular question in its report or to rule it out of its consideration). (See Note 61, this Brief).

[42] No doubt the Illinois authorities appreciate the feelings of Thomas Carlyle who, when clearly shown up in an error, admonished his critic, "Young man, you are heading straight for the pit of Hell." Still, it must be pointed out, four of the six members of the character committee who voted for petitioner in 1959 had signed the unanimous committee report against him in 1954.

[43] Thus, the chairman of the sub-committee conducting the examination of petitioner informed him, "It has been pointed out before to you, that the mere fact that a question is asked does not indicate that other people would have asked or approved that question, nor does it indicate that any particular weight will be attached to the answer or failure to answer the question . . . " (R. 237).

swer and which the Illinois bar authorities would just as soon forget about.[44]

Nevertheless, petitioner's application has been denied and an opinion written to justify this rejection. Since reasons were not to be found in the case as it stands to justify the action taken, another course had to be followed: the author of the *per curiam* opinion of the court below was reduced to discussing a case that had no basis in the record. This is why that opinion has so unrealistic and formalistic a tone; and this, in turn, is why Mr. Justice Bristow's dissenting opinion is as startlingly effective as it is: he takes the record seriously and talks about the case and about petitioner's qualifications, rather than confining himself to an abstract discussion of the threats of Communism and of cases that have little if anything to do with the problem of admission to the bar.[45]

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[44] But, it might now be argued, the Illinois bar authorities do not insist that an applicant must answer every question asked him; rather, they insist only upon those questions which, after extended reflection and deliberation, the character committee decides the applicant should have answered. Even if one overlooks the difficulty faced by an applicant who must predict which questions the committee might later vote to take seriously, the problem remains (to which we return again and again), why should these specially designated questions be singled out in this case, as distinguished from the other unanswered questions? Is it because of any evidence the committee had, or because of petitioner's views on the right of revolution and the Declaration of Independence?

Whatever selectivity the committee later exercises, it is prejudicial for an applicant to have to resist even clearly improper inquiries on the part of the committee, if only because the committee is not accustomed to such a reliance upon personal judgment on the part of applicants appearing before it (See Note 61, this Brief).

[45] Great reliance is placed by the Illinois bar authorities on the *Beilan* and *Lerner* cases, 357 U.S. 399, 468. But the *Beilan* and *Lerner* situations seem clearly distinguishable from bar admission matters. For *Beilan* and *Lerner* do no more than apply a public employees doctrine that had been long established by cases such as

B. The lack of a foundation and various "incidental" objections.

The due process and equal protection clauses of the Fourteenth Amendment seem to offer additional restraints on the attempt by Illinois to put undue emphasis upon the questions petitioner has refused on principle to answer.

It would seem, in the first place, that a foundation must be established for a kind of question that is not usually associated with the primary "character and moral fit-

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Adler v. *Board of Education*, 342 U.S. 485, and *Garner* v. *Los Angeles*, 341 U.S. 716, when the bar admission cases of *Schware* and *Konigsberg* were decided. *Beilan* and *Lerner* deal with situations where, partly because of the statutes involved, a refusal to answer questions was regarded as *ipso facto* disqualifying for public employment. A refusal to answer constituted incompetency, and even substantial obstruction; a warning to this effect was clearly given by the state authorities; and the record is primarily devoted to this warning. In addition, these two cases deal with situations in which evidence of the proscribed affiliations was in the record. Professors Kalven and Steffen, in Section II of their *amici* brief in the court below, develop these distinctions (R. 501-508).

The *Barenblatt* case, 360 U.S. 109, which is also relied upon below to justify the ruling on petitioner's application, is disposed of by Mr. Justice Bristow in his dissenting opinion (Appendix, Pet. Writ. Cert., 67):

> . . . It is one thing to sustain the constitutionality of subversive affiliations questions when they are propounded to one identified as a Communist, and submitted by an Un-American Activities Committee of the United States Congress, charged with discovering communist infiltration. It is quite another thing, however, to sanction such questions when asked of one against whom there is not a scintilla of evidence of subversive affiliations, and when the questions are submitted by a bar admission committee, charged only with ascertaining applicant's moral character, and in no way authorized by statute or rule of court to investigate or reject members of any political persuasion from the profession.

Similar considerations would seem to govern *Uphaus* v. *Wyman*, 360 U.S. 72.

ness" concern and function of the committee.[46] Most of

[46] The Illinois bar authorities have ignored the traditional "moral character" tone of terms such as "character and general fitness" and have also engrafted political tests upon the simple oath "to support the Constitution." Thus, they have refused to employ words with that precision which they had come to assume in a legal context but have substituted an emphasis that rests upon vague and indefinite notions about political affiliations and suspected philosophical ideas and opinions. This departure from the established meaning of these terms, and from the accepted purpose of these committees, raises serious questions about due process of law. *Jordan* v. *DeGeorge*, 341 U.S. 223, 230-232. Especially is this so in circumstances where *ex post facto* and bill of attainder considerations may be applicable. Cf. *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277.

That the "moral character" concern is primary and dominant in Illinois is suggested not only by the name of the committee but also by the language of the rule (or statute) establishing the committee (set forth, above, at page 7). Thus, the terms used are, "character and moral fitness," "good moral character and general fitness," "moral character and good citizenship" ("good citizenship" inquiries seem to have been traditionally directed, if the standard application forms provide a clue, to the applicant's military and civic record and to his understanding of the principles underlying the Constitution of the United States, of the principles underlying the Constitution of the State of Illinois, and of "the obligations of good citizenship" (R. 381-382)).

The standard applicant's questionnaire items reinforce this emphasis upon "moral character" as do the questions on the standard forms executed by character references, employers and the officials of educational institutions attended by the applicant (R. 388-414). On these forms the terms used are, "moral character and general fitness", "reputation or character of the applicant", "honesty", "integrity", "general conduct", "worthy of the highest trust and confidence", "traits of mind and character"; particularly significant is the one example used, "Would you recommend him as the guardian of a minor's estate?" Admittedly, various political tests can be rationalized as serving the purpose of investigating an applicant's honesty, integrity, etc. But such tests are foreign to the dominant concern and spirit of "moral character". Cf. R. 72-73.

It should be acknowledged that character references *are* asked whether they have "ever heard any question raised as to applicant's adherence to and support of the principles of the Constitution of the United States." But, as with the inquiry about the principles underlying the Constitution which is found in the applicant's questionnaire, the emphasis seems again to be on general principles, not on partisan

the questions asked by the committee in the usual course of its business, which are elaborations of and related to those included in its standard application questionnaire, do not require such a special foundation or justification.[47] But a serious problem is presented when inquiries are novel, especially when they intrude into sensitive or controversial political and religious areas.[48] The problem

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political issues or on political affiliations. This is a distinction that petitioner has respected: he has cooperated fully with the committee by speaking at length on his understanding of the principles of the Constitution and on his conception of good citizenship (see Note 18, this Brief); he has consistently refused to answer questions about political affiliations (thereby, he believes, demonstrating his willingness really to support the Constitution).

Thus, we suggest, it would be well for character committees to restrict themselves to their dominant moral character concern: it is evident in petitioner's record that committee members have neither the training nor the experience to conduct political inquisitions with any degree of sophistication or self-restraint. They do know from their years at the bar how and why some lawyers betray their profession—and it is this experience, not dogmatic generalizations about "subversives", that they have been commissioned to draw upon in their capacity as members of committees on character and fitness.

[47] Most of such questions have had foundations established for them by usage or by the accepted purpose of the character committee (and therefore do not require justification in the special circumstances of the particular proceeding). Thus, an incomplete questionnaire would normally obstruct the operation of the committee, especially when the omitted information dealt with such essentials as the name, age, addresses, academic history, police record, etc. of the applicant.

[48] See *Sweezy* v. *New Hampshire*, 354 U.S. 234, on the need to lay a foundation for questions that, on their face, invade certain constitutional rights. This caution is implicit in *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 639, where it is said:

> . . . The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedom of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.

A "foundation" was laid for the first political question petitioner refused to answer during the current proceedings by establishing

is made even more serious when the questions (novel or long-acquiesced-in) are of a test-oath nature and, as such, arouse conscientious and plausible resistance on the part of even the most "innocent."[49]

No attempt has been made to show why the unanswered questions are necessary or even useful in the context of this case, why they should be asked generally of ap-

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first that petitioner was of Greek descent! (R. 27). It had just been learned that petitioner was not a member of *any* Greek nationality group; but when the question was put in political terms, by reference to a particular organization which was said to be on "the Attorney General's list", petitioner returned to his position that he would not answer political inquiries (R. 28). The episode has been set forth at length in the Statement of the Case, at pages 13-16.

It is submitted that this episode, which reflects anything but fair play, is really symbolic of all the affiliations inquiries in this case. And yet the committee can suggest that petitioner's principled refusals to answer such questions interfere with a proper determination of his character and fitness. Everyday notions of due process, of how judicial bodies should regulate themselves, are sufficient to condemn behavior of this kind. See petitioner's 1959 brief in the court below, 8-12 as well as Appendix, Pet. Writ, Cert., 56.

[49] The novelty of these questions is emphasized by the repeated statements by the commissioner chairing the hearings that he did not know how this or that question would be regarded by other members of the committee when the time came to deliberate and vote. (Some of these disclaimers are italicized in the passages reproduced in the Statement of the Facts). One gets the impression, as he reads through the record, that the committee does not know what it wants. The applicant is left to guess what will be taken seriously and by whom during some distant deliberation by the committee. Indeed, the committee majority seem united only in their resentment at the fact that petitioner should exercise an independent judgment which permits him to know what *he* wants. Consider this Court's rulings in *Watkins* and *Sweezy*, which provide that a witness before a legislative committee or similar agency must be given, by some means, a fair basis for judging whether refusal to answer questions would be illegal. 354 U.S. 178, 234. This requirement is comparable to the constitutional requirement of reasonable clarity in the definition of crimes.

plicants,[50] why they should be asked of this applicant, or why a failure to answer them in any way obstructs the committee in its duty to pass upon petitioner's character and fitness as a lawyer. In fact, as we have seen, the committee in effect concedes it had no basis for putting these special questions even to an applicant about whom much more is known than is the case with the usual applicant.[51]

Incidental procedural due process objections—"incidental" only in the sense that they are overshadowed for the moment by petitioner's other objections—are to be seen in the refusal of the committee to abide by the previous ruling of the court below as to the areas to be inquired into during the rehearing;[52] in the repeated refusal

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[50] Committee members casually express dogmatic generalizations about organizations and lists of organizations as if they had never heard of the presumption of innocence, of everyday judicial procedures and standards, or even of the rule of law. Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123. It is obvious in the record, furthermore, that some organizations are asked about that are not known, even by name, to petitioner. We should not be surprised to learn that the committee, which seems to know no more about the unfamiliar organizations than does petitioner, could not have said what made these organizations "subversive". Indeed, what indication is there that these organizations are still in existence (if they ever existed)?

[51] The committee chairman admitted the Communist Party and other such questions are asked "in many cases" without foundation or "out of the blue" (R. 233):

> . . . the question has frequently been asked where there is no indication on the face of the questionnaire, and the answers thereto, or the affidavits, or of the discussions up to that point, as to the man's having been or even suspected of being a member of various organizations of that nature.

[52] This objection is spelled out in petitioner's 1959 brief in the court below. See, also, Note 5 (this Brief).

This order of the court is the nearest petitioner has come to securing anything like a pleading, showing him what the case is about and what to expect. Neither the committee report nor the opinion of the court below addresses itself to the complaint of petitioner that the affiliations inquiries were outside the scope of inquiry laid down by the 1957 order of the court below. (The language of this order should be compared with that of Commissioner Rothschild's

by the committee to comply with petitioner's requests that he be notified of the subjects to be covered during the rehearing and from one session to the next;[53] and in the refusal by the committee to acknowledge all the evidence favorable to petitioner collected by members of the committee.[54]

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dissent that preceded it. Appendix, Pet. Writ. Cert., 6, 7). This refusal to abide by carefully designated limits—by "the law of the case"—reinforces the due process objections made by petitioner.

Both Mr. Justice Bristow and the committee minority point out that the committee majority made findings favorable to petitioner on all matters designated for inquiry in the 1957 rehearing order of the court below (Appendix, Pet. Writ. Cert., 64, 28-29).

[53] See, *e.g.*, petitioner's letters of March 3, 1958, March 27, 1958, and April 15, 1958 (R. 61, 119, 438).

[54] See, *e.g.*, the exchange of letters of April, 1959 (R. 473-475), which is supplemented by petitioner's report to the court below in his 1959 brief in that court (pp. 16-17):

> . . . I have received additional information about more contacts of the kind I describe in my letter of April 16 [1959]. It even seems that individuals who had submitted character affidavits on my behalf were questioned about me by individual members of the Committee who were either acting officially or improperly (Committee Rule 15) . . .

The disposition of the committee to suppress evidence favorable to petitioner is not new. See R. 49-50 and the elaboration thereupon in petitioner's letter of March 27, 1958 (R. 115-117). See, also, Note 27 (this Brief).

Professor Sharp's comment upon this behavior of the committee would apply as well to the other "incidental" objections that have been listed here ("Freedom and a Free Bar", 17 Lawyers Guild Rev. 45 (1957)):

> An investigator purporting to represent the committee appeared in Mr. A.'s home town, and asked friends and neighbors about Mr. A.'s qualities and record. Word of the matter came naturally to Mr. A. He repeatedly asked for the report. The committee did not deny that it had been made, nor raised any question about the authority of the investigator, but they refused to let Mr. A. see a copy of the report. The report was almost certainly favorable. Nevertheless, as every representative of business knows, similar action by an administrative agency charged with regulation of business would be a violation of those elementary decencies of procedure properly held to be safeguarded by the due process clauses of state and federal constitutions. This is a reminder of the eerie proceedings of Franz

Implicit in much of what is said in this Brief and reflected in the artificiality of the problems discussed in the opinion of the court below is perhaps the most serious criticism that can be leveled against any judicial body: we refer to the disturbing tendency of the Illinois bar authorities to ignore the case made by petitioner.[55] This is disturbing in that it subverts the reliance upon reason to which the bar should be committed and upon which the law must depend.[56]

Kafka's *Trial* and of the consequences which may be expected from the extension of loyalty and security proceedings in schools, industry and government, to the Bar.

It is against this background of clandestine informal (and even formal) investigations and of suppressed evidence that the complaint of the committee (which was repeated by the court below) must be assessed (App., Pet. Writ. Cert., 24, 39):

> In the course of the rehearing proceedings, the Committee conducted no independent investigation into applicant's character, reputation or activities. The Committee has no personnel nor other resources for any such investigation . . .

[55] We have suggested that the opinion of the court below would have been much more appropriate at the time of (and in lieu of) its 1957 decree ordering this rehearing: at that time there would have been no record and arguments related to the long examination of petitioner to take account of. This suggestion is reflected in Mr. Justice Bristow's remonstrance (Appendix, Pet. Writ. Cert., 77):

> Before concluding this dissenting opinion, I am constrained to note that it is hardly consistent with judicial objectivity for the *per curiam* opinion to have overlooked every item of positive evidence submitted in support of establishing applicant's good moral character.

[56] Several well-known stories from across the centuries seem to petitioner to throw light upon the extent to which practical life can be expected to rely upon reason.

In the carefully designed *Stanza della Segnatura* in the Vatican, one of the scenes executed by Raphael is of the Judgment by Solomon. The orientation of this scene, including the direction which even Solomon must ultimately look for guidance in dispensing justice, is toward Philosophy which is represented on an adjacent wall.

Classical mythology reports the opposition of Athene and Poseidon: this opposition is reflected in the epic struggle of Odysseus to return to Ithaca; it is celebrated in the West Pediment of the Parthenon with its contest between the two gods over the naming (and, hence,

C. The relevance of the Konigsberg and Schware cases.

An aspect of procedural due process seems to be involved as well in the refusal of Illinois to abide by the law of the land with respect to bar admission matters, the rulings of this Court in the *Schware* and *Konigsberg* cases three years ago. Serious problems are created by the refusal of a committee on character and fitness to be anything but scrupulous toward the decisions of this Court.[57]

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possession) of this city. Poseidon can be taken to represent the human passions, deep, restless and powerful as the sea; Athene, on the other hand, reason and wisdom. The contest will continue so long as men endure: there is enough of the "Poseidonic" in every man and every doctrine to make a permanent resolution or settlement impossible. But there are better and worse times, men and doctrines, depending in part on the role that Reason and Practical Wisdom are permitted and able to play in human affairs.

It is prudent, furthermore, to recognize that there may be inevitable tensions between practical life and a life based on reflection:

> For you know well, men of Athens, that if I had actively engaged in the affairs of the state, I would have perished long ago and neither to you would I have been of any use whatever nor to myself. And do not be offended at my telling you the truth: for the truth is, . . . he who will really fight for the right, if he is to be spared even for a while, must act as a private citizen and not in a public capacity.

If the reader is annoyed at the intrusion of the speculations of this footnote into a "practical" brief, he can appreciate at first hand the not altogether unjustified reaction of the character committee upon first being confronted by petitioner's unlawyerlike principles and mode of discussion.

Indeed, petitioner's underlying folly in his encounter with the Illinois bar is implicit in the argument of this footnote. (See, *e.g.*, R. 119)

[57] In Illinois, petitioner pressed his application for a rehearing in 1957 on the mistaken assumption that the local authorities would set him an example in law-abidingness. In California, the bar authorities resorted to technical evasions of the mandate of this Court. In New Mexico, we understand, Mr. Schware again encountered opposition upon endeavouring to take advantage of the unanimously-supported mandate of this Court and thereupon decided to abandon the legal profession—he, at least, seems to have quit while still ahead.

We have already suggested the bearing of the *Schware* case on petitioner's matter. The present scope of the *Konigsberg* case will no doubt be examined in the case set down for argument immediately after petitioner's. If *Konigsberg* remains authoritative, then there should be no difficulty with petitioner's case: (1) nothing is wrong with petitioner's views on the right of revolution and the Declaration of Independence;[58] (2) no satisfactory reason has been given by Illinois why the unanswered questions about political affiliations should be insisted upon or why these questions should make any difference in petitioner's case; (3) no "warning" was given, or could reasonably have been given, that refusal to answer a committee question would be considered obstruction *per se* so as to prevent the committee from being able to pass on petitioner's qualifications[59]—in short, there is no basis

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[58] The concern of the committee majority about petitioner's attitude toward the enforcement of judicial decrees is not justified by the record. Petitioner had simply indicated that there may be judicial decrees, as well as actions on the part of the executive or the legislature, which might conceivably justify resistance (R. 161-167, 211-220). It is true that Mr. Konigsberg disavowed revolution in all circumstances, present or future, whereas petitioner has repeatedly endorsed the Declaration of Independence. But this is hardly a distinction that should have any adverse effect upon an evaluation of petitioner's character and fitness.

Indeed, the record indicates, petitioner's views on this and other subjects seem to qualify him for inclusion in the category of "law-abiding traditionalist" which Mr. John R. Starrs concludes "is probably as close as we are going to be able to come . . . to reducing the concept of the man of good moral character to a few words." 18 Univ. Detroit L. J. 195, 206 (1955). See, for Mr. Starrs's comment, on petitioner's case, Note 57 *et seq.* in his article.

[59] During the course of petitioner's examination by the committee, the chairman of the committee, at every point where the significance of a refusal to answer questions was discussed, conceded implicitly or explicitly that such a refusal was but one piece of evidence to be evaluated as part of the record. (R. 30, 102-103, 135, 237, 294; also R. 4, 6, 34, 190). A careful examination discloses that there is not in the record any warning that a refusal to answer a particular question would be sufficient grounds for exclusion. Such

for distinguishing to petitioner's disadvantage his case from Mr. Konigsberg's.

But, independent of the final disposition or even of the existence of the *Konigsberg* case, it is once again submitted that petitioner has clearly established his character and fitness for bar admission purposes.[60] We pre-

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a warning (based on a rule or statute, of which there is no such in Illinois) would have to be given in order to justify an avoidance of the holding of the *Konigsberg* case, 353 U.S. 253, at 261. If, however, the warning referred to in the *Konigsberg* opinion is considered to have been given petitioner and if petitioner's other Fourteenth Amendment objections are discounted, then this Court would seem to be faced with the problems that were set aside as unnecessary to reach in the *Konigsberg* case, the "far reaching and complex questions relating to freedom of speech, press and assembly." These freedom of speech questions are discussed in Section II of this Argument.

One of the most puzzling aspects of this case is seen in the committee argument that an exchange of letters between the committee and petitioner in September 1958 (four months after the hearings had concluded) deprives petitioner "of any benefit from the decision in the *Konigsberg* case." (Appendix, Pet. Writ. Cert. 20). These letters are set forth at R. 441-447. (See Note 45, this Brief). The authors of this passage in the committee majority report must have relied on a mistaken recollection of what these two letters contain. Not the least curious aspect of the committee majority report is the remarkable suggestion that an applicant who disagrees with the committee majority in interpreting or applying the opinions of this Court is thereby to be considered of dubious character. Appendix, Pet. Writ. Cert., 27. We suspect that the desperation evident in these maneuvers reflects the belated realization by the committee that no unequivocal warning had been, or in the nature of things could have been, given during petitioner's appearances before the committee.

[60] Commissioner Rothschild recognized in his 1957 dissenting opinion that petitioner's position with respect both to the right of revolution and to answering certain kinds of questions had remained the same since 1950 and had not been specially adapted to the rulings of this Court in subsequent cases. Appendix, Pet. Writ. Cert., 5.

The many references to the *Konigsberg* case in this Brief should not conceal the fact that in certain essential respects petitioner's case is more like the *Schware* case: the role of the unanswered questions

sume to suggest, however, that it would be well for this Court, irrespective of petitioner's matter, to reaffirm its decision in the *Konigsberg* case, if only to discourage those who are disposed to think that either technical evasions or obvious defiance of this Court's decrees can prove successful.

II. Freedom of Speech and the Free Exercise of Religion.[61]

Even more basic constitutional considerations than petitioner's due process arguments are objections that draw upon the First Amendment. That is to say, the States

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is minimized if not virtually ruled out here by the admissions made by the committee; the striking impression that remains is the refusal of the committee to give due weight to the "dictates of reason" and to the overwhelming character of the evidence in the light of the "character and fitness" purpose of the committee (353 U.S. 232, at 249).

[61] The committee was obliged, after a grievous research blunder by one of its members, to rule out of its consideration petitioner's refusal to answer questions about religion. (R. 137-138, 185-194, 256). But anyone familiar with human nature must realize that petitioner won no support from men who were shown to be so obviously in error that their colleagues took the unprecedented step of repudiating their questions. (See Note 41, this Brief). Mr. Justice Bristow's comment reflects the serious problem of religious freedom implicit here (Appendix, Pet. Writ. Cert., 58 59):

> This precise point, that refusal to answer may be indicative of good character, is evident in the record. Applicant courageously and properly refused to answer the unconstitutional religious inquiries. . . . This line of inquiry, persisted in since the very first session, and apparently based upon an 1856 decision, was later admitted by the committee to be improper and unconstitutional since 1870.
>
> The *per curiam* opinion completely overlooked this portion of the record. I cannot follow that course, particularly since the record shows that applicant's refusal to answer these religious questions had so prejudiced the committee that one member stated that the refusal to answer had a "substantial bearing on his [applicant's] fitness to practice law." Such prejudice could hardly be wiped out by the statement of the chairman that these improper questions would not be taken into consideration.

are said to be obliged not to abridge the rights of citizens to freedom of speech and to the free exercise of religion.[62]

Petitioner has been penalized, throughout his association with the Illinois bar, for the expression of his views on the Declaration of Independence and the right of revolution.[63] It was only because committee members took

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[62] This doctrine can be traced back, through cases such as *West Virginia Board of Education*, 319 U.S. 624, and *Cantwell* v. *Connecticut*, 319 U.S. 296, to *Gitlow* v. *New York*, 268 U.S. 652. Although petitioner has serious reservations about the policy of the Fourteenth Amendment as interpreted in the *Gitlow* case, he recognizes that some such limitation upon the States must be insisted upon so long as Congress does not acknowledge and exercise the power that seems to have been given it under the First Amendment to ameliorate or remove state abridgements of the freedom of speech. Similarly, this Court has an obligation (in petitioner's view) either to review for their wisdom as well as constitutionality restrictions upon entry into the state bars or to provide means by which qualified citizens might be admitted directly to the bar of this Court and to the federal bar without prior admission to the bar of any State. (See Note 76, this Brief). Direct admission of petitioner to the bar of this Court is included in the request for relief set forth in the Conclusion to this Brief.

Petitioner discusses the problem of the proper relation between State and Union with respect to freedom of speech in a PhD dissertation which is nearing completion, *Notes on the First Amendment*. It is sufficient and appropriate for his purposes here, however, to accept the orthodox view on this problem. (It should be further noted that there is no doubt that the Constitution of Illinois guarantees the right to freedom of speech against any infringement by the State of Illinois, Art. II, Sec. 4. This prohibition alone would be sufficient to justify an applicant's condemnation as unconstitutional the committee's inquiries about political affiliations. See, also, Art. V, Sec. 25, Constitution of Illinois).

[63] Even the court below, in its 1957 mandate ordering the present rehearing, recognized (Appendix, Pet. Writ. Cert., 7, 37):

> The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg* v. *State Bar of California*, 353 U.S. 252, and *Yates* v. *U. S.*, 1 L. ed. 1356. . .

offense at petitioner's views on this subject (which were elaborated in response to questions) that he was asked about his affiliations in the first place.[64] Continuing resentment toward his perfectly proper views on rightful rebellion is to be seen throughout the present record and crops out several times both in the committee majority report and in the *per curiam* opinion of the court below.[65] But if anything is protected by the First and Fourteenth Amendments against attack by the States, surely it must be the expression of that fundamental American political opinion,[66] a belief in the Declaration of Independence and the right of revolution.

Furthermore, it has been long recognized that the protection of political opinions extends to the political organizations devoted to the advancement of those opinions. It is not difficult to appreciate that effective protection of the expression of political opinions, especially in the large modern state, must include protection of the means by which such opinions are promulgated and advanced. It would seem, therefore, that the Communist Party and

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[64] This sequence is set forth in detail in petitioner's Closing Argument, R. 320-331. Compare the mistaken version to which the court below seems to consider itself committed, Appendix, Pet. Writ. Cert., 35-36. (See Note 28, this Brief).

Petitioner expressed his views on the subject of the right of revolution and the Declaration of Independence during the current rehearing only after his objections against such discussion were overruled by the committee. (R. 145-147, 148-157, 164-167, 207-220, 341-342, 347-348). See Note 18, this Brief, for an explanation of why petitioner cooperated fully with the committee with respect to this inquiry.

[65] Appendix, Pet. Writ. Cert., 14-16, 40-41. It is clear in the record that the resistance to court decrees, of which so much is made, is put in terms of restoring or protecting constitutional government and is perfectly consistent with loyal support of the Constitution. (R. 161-167, 211-220; Appendix, Pet. Writ. Cert., 55).

[66] See Dr. Laurence B. Berns' thoughtful *amicus* letter in the court below. (R. 493-497). See, also, R. 278-280.

the Ku Klux Klan would be entitled to such protection, even to the extent that inquiries relating to those organizations would (except in special circumstances) constitute an abridgement of the freedom of speech both of the community at large and of the citizen to whom such inquiries are directed.

However the matter is viewed when a known member of the Communist Party or of the Ku Klux Klan seeks admission to the bar,[67] it should be a much easier case when there is the explicit denial by the character committee of any suggestion that the applicant before it is such a member. Does not freedom of speech extend to the right to refuse to affirm or deny on threat of civil penalty any set of opinions or affiliations of a political nature?[68] That is to say, is not one protected in the right to preserve silence on such matters, in the right not to speak? Cannot this be regarded as a citizen's way of speaking, of protesting against unconstitutional and ungentlemanly developments, against developments that promise nothing but further harm to his country and chosen profession? Such is the rhetoric of the historic opposition to the test oath.[69]

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[67] "As we said before, the mere fact of Konigsberg's past membership in the Communist Party, if true, without anything more, is not an adequate basis for concluding that he is disloyal or a person of bad character." *Koningsberg v. State Bar*, 353 U.S. 252, 273.

[68] If only the "guilty" are protected in this respect, then the First Amendment tends to become indistinguishable from the popular view of the Fifth Amendment.

[69] The legitimacy and respectability of such refusals as petitioner's are evident to anyone familiar with the traditional attitude toward test or loyalty oaths. (See *Story on the Constitution*, 5th ed. 1891, Sections 1847-49; *Encyclopedia Brittanica*, 14th ed., "Test Acts", Vol. 21, pp. 976-977; *Catholic Encyclopedia*, ed. 1912, "Test Oath, Missouri," Vol. 14, pp. 538-39). This Court, in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, has indicated, as did the dissenting opinion (319 U.S. at 663-64), that that attitude is not

The concession by the committee that it has no adverse evidence points up the element of protest in petitioner's refusal to answer certain kinds of questions and hence emphasizes the problem of freedom of speech raised by this case. This concession—that the committee has never had suggested to it any evidence linking petitioner to any "subversive" organization—points up as well the significance of petitioner's views on the Declaration of Independence in his decade-long exclusion from the bar.

Whether or not petitioner is correct in his constitutional views, there cannot be any doubt that he believes himself to be acting in defense of the constitutions of his state and of his country.[70] Nor can it be doubted that there is substantial authority in the opinions and decisions of this Court to lend support to the constitutional views he has relied upon.[71] Thus, it should be recognized that the

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without foundation in constitutional law. Additional indications of the traditional attitude are seen in Art. VI, Constitution of the United States (religious test prohibition); Art. V, Sec. 25, Constitution of Illinois (exclusive oath provision); *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277. (See, also, 37 A.B.A.J. 123 (1951), a letter from respected lawyers in opposition to the proposed American Bar Association anti-Communist loyalty oath. Still, a loyalty oath would be generally preferable to the kind of examination undergone by petitioner: the text of the oath is available for inspection and deliberation; one knows what he is confronted by; allowances do not have to be made for the peculiarities and prejudices of individual examiners.)

[70] There is exhibited in the record one of the dangers against which petitioner's position is designed to guard: government officials become accustomed to asking about affiliations with unpopular political organizations and, before long, they find themselves acquiescing in questions about religion, about a bar applicant's understanding of what is said to be Marxist and Leninist doctrine, as well as in questions relating to the Republican and Democratic Parties. See Notes 23, 61, and R. 81, 156. Once again it can be seen that the first compromises, which are so enticing, are the most treacherous.

[71] E.g., *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624.

First Amendment might prohibit the kind of inquiries insisted upon by the character committee or at least protect petitioner in his resistance to such inquiries and in his defense of the Declaration of Independence.[72] But whatever the validity of petitioner's constitutional views, there is nothing in his position and in the arguments that have been used to support it either to suggest he is unfit to practice law or to negate in the slightest the overwhelmingly favorable evidence in the record with respect to his character, fitness and citizenship as an applicant for admission to the bar.[73] And this, it should be remembered, is all anyone claims the committee is empowered by law to pass judgment on.[74]

III. Toward a Truly Responsible and Law-Abiding Bar.

It is fitting as we draw to the end to comment upon the concluding remarks in the *per curiam* opinion of the court below. It is there suggested that petitioner "failed to respond to the higher public interest" and that he has been guided only by his "purely personal interest" in

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[72] "Government censorship can no more be reconciled with our national constitutional standard of freedom of speech and press when done in the guise of determining 'moral character,' than if it should be attempted directly." *Konigsberg* v. *State Bar*, 353 U.S. 252, 269.

[73] See *Application of Murra*, 166 F. 2d 605 (7th CCA, 1948), 178 F. 2d 670 (7th CCA, 1949), where an application for naturalization was approved even though the applicant had refused to answer certain questions put to him upon being examined before the Immigration and Naturalization Service.

[74] Professor Wilber Katz's comment to the committee, when he appeared before it in the course of petitioner's 1950-1951 hearing, is still appropriate (Record filed in this Court, 1955, p. 69):

> The way in which the Committee conducts its inquiry, the type of inquiry the Committee conducts, puts an Applicant who has the views he does as to loyalty oaths and inquiry of that kind into the dilemma where he must abandon that principle or run the risk of not carrying the burden of persuasion . . . I should think the record would permit a finding that he has sustained the burden.

following the course he has taken. Unfortunately, this ungenerous suggestion does a disservice to the State of Illinois in that it really denies the possibility of public-spiritedness by degrading to the most selfish level the conduct and aspirations of her citizens.

It is difficult to see what merit there is to this suggestion if words such as "purely personal interest" are used in their ordinary sense: petitioner first took the position he did during the darkest days of the Korean War, at a time when he had no known supporters and little chance of success; not only has his legal career been interrupted if not permanently ruined but university and law school teaching alternatives have been almost completely unavailable as a result of his differences with the Illinois bar; and his net loss of income over the past decade—if it is remembered that he ranked very high academically in his law school class—must be well over fifty thousand dollars.

It must be at once conceded, however, that these personal sacrifices are trivial when compared to the higher public interest to which petitioner has tried to devote himself. Once again petitioner commends to this Court's attention his Closing Argument before the Committee on Character and Fitness (R. 314). He is satisfied that he has not only acted as a man should but may even have had the good fortune to be able to make a contribution to constitutional government and the rule of law.

Genuinely serious problems confront the bar. These problems, which have little to do with the far-fetched but yet crippling issue of "subversives in the bar," have been defined by petitioner in the following terms:[75]

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[75] Anastaplo, Review: Drinker, *Legal Ethics*, 14 Law. Guild Rev. 144 (Fall, 1954) (submitted to the committee, R. 123-124).

"Most of the serious criticisms that have been leveled against lawyers and the law reflect doubts about the lawyer's appreciation of the nature of justice. The enduring quality and source of such criticisms suggest that there may be basic defects in the lawyer's make-up or role as now conceived. If so, a basic re-evaluation—a look at first principles—might be in order. And this suggests, if anything of significance is to be developed about what the lawyer should be, the need for a consideration of the place of philosophy in the legal community and in the society. Works [on legal ethics], with their detailed description of the efforts at self-control by the Bar, testify to the existence of an awareness of moral distinctions from which the philosopher must work in his consideration of practicable rules of conduct.

* * *

"We have suggested that the moral standards of the lawyer are, for the most part, both conventional and unexamined. Yet, if the conventional morality were taken even more seriously by the Bar and its committees, it would serve as an indication of a wider interest in these matters on the part of the practitioners. [As has been pointed out,] 'One of the principal reasons for the public's suspicion of lawyers is the justified belief that lawyers and judges are loath to proceed against lawyers known or strongly suspected of wrongdoing.' But no matter how vigilantly the Bar proceeds along its present course, it may be that the merits of even conventional morality must remain unappreciated until enough young lawyers are led to regard as vital such problems as whether it is better to do than to suffer injustice. If there is to be serious inquiry into these problems, thoughtful and responsible lawyers should appreciate the need to restrain those complacent, impulsive and sometimes powerful colleagues who would keep much of the life of the Bar unexamined.

"Fundamental improvements in the general standards of the legal profession cannot be brought about quickly, if at all. In the meantime, we hope to continue to see followed the guidance and example of those lawyers who act decently and according to time-honored precepts. In fact, for all we know, most members of the bar should never be expected to do more than imitate the more esteemed of their fellows. Perhaps, indeed, the contribution of the philosopher consists in offering what counsel and assistance he can to those who have always esteemed as an example of the good man one who obeys the injunction 'to do justly, and to love mercy, and to walk humbly with thy God.'"

Conclusion.

For the foregoing reasons, relating to both the common good and individual rights, it is requested that this Court provide for petitioner's admission to the Illinois bar, preferably with the status of an attorney retroactive to that morning in November of 1950 when this case unexpectedly began. In addition, petitioner again advances the suggestion that he be admitted directly and at this time to the bar of this Court, independently of the action Illinois might be induced to take. Such direct admission would insure one remedy that this Court can provide without having to depend on the sometimes reluctant cooperation of a state court.[76]

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[76] The rationale of direct admission is suggested in Note 62 of this Brief. We understand that disbarment by federal courts does not automatically flow from disbarment by state courts. Should not this Court insist in appropriate cases upon a like independence of the state courts' determinations with respect to bar admissions? Additional discussion of petitioner's proposal is to be found in the 1955 papers submitted by him to this Court (Jurisdictional Statement, 39-40; Petition for Rehearing, Notes 10, 11; Motion by George Anastaplo for Leave to File an Application for Admission to the Bar of the Supreme Court of the United States (denied, 349

Thus, this Court is again offered the opportunity not only to endorse but even to extend the contribution that petitioner has attempted to make to a responsible and independent bar, and through the bar to his country.

Respectfully submitted,

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U.S. 903, 908)). See, also No. 8, Questions Presented for Review (this Brief).

Related to this proposal as well as to the review sought of the action by Illinois is petitioner's suggestion that this Court has the power and obligation to examine the methods employed in the state courts which supply the bar of this Court and to correct state action which excludes an applicant who is qualified to practice both in his State and before this Court. Such a power would seem to rest in the paramount judicial body in the United States and would be comparable to Congressional power to evaluate and correct State electoral requirements. Although the Congressional power is derived from an explicit constitutional provision, it provides a model for a Court that has never hesitated to enforce implied prohibitions against the burdening by States of federal instrumentalities. *McCullough* v. *Maryland*, 4 Wheat. 316. Of course, the power of States to admit is not, "while this Court sits," the power to deprive this Court of counsel. But this state power, if not examined scrupulously both for unwisdom as well as unconstitutionality by this Court in situations where marked departures from usual and accepted practices are evident, is the power to affect adversely the quality of the bar of the Supreme Court of the United States as well as of the subordinate federal courts which are more limited in self-protection. The assertion of any latent power to examine state bar admission policies and practices would be particularly appropriate in an era when scholarly research and judicial action seem to be limiting the scope of previously accepted constitutional limitations upon government action.